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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 188~~5~~. 8

No. 602. ~~301~~ 42

M. L. BUNDY, RECEIVER OF THE HOT SPRINGS NATIONAL BANK OF HOT SPRINGS, ARKANSAS, APPELLANT,

vs.

WILLIAM M. COCKE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED SEPTEMBER 21, 1885.

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Caption	1	1
Bill of complaint	2	1
Dismissal as to Flannagan *et ux.*	8	3
Demurrer of Cocke *et ux.*	8	4
Suggestion of death of Mrs. Cocke, &c.	11	4
Bill of revivor	12	5
Demurrer of Cocke to bill of revivor	28	10
Submission on demurrer	30	10
Order sustaining demurrer	30	11
Opinion	31	11
Decree	35	12
Prayer for and allowance of appeal	35	12
Clerk's certificate	37	12

JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 Proceedings of the circuit court of the United States for the district of Kentucky, at a regular term, begun and held at Louisville, on Monday, February 16th, 1885.

Present: Hon. John W. Barr, judge of the United States for the district of Kentucky.

Caption.

M. L. BUNDY, Receiver of the Hot Springs National Bank, of Hot Springs, Arkansas, Complainant,

vs.

WILLIAM M. COCKE, AMANDA M. COCKE, JAMES FLANNIGAN, SUE FLANNIGAN, Defendants.

Be it remembered that heretofore, to wit, on the 4th day of February, 1885, came the complainant, by Brown & Davie and T. B. Fairleigh, his counsel, and filed his bill of complaint against the abovenamed defendants, which bill is as follows, to wit:

2 *Bill of Complaint.*

In the Circuit Court of the United States for the District of Kentucky. In Chancery.

UNITED STATES OF AMERICA,
District of Kentucky, } *ss:*

To the judge of said court in chancery sitting:

Martin L. Bundy, receiver of the Hot Springs National Bank, of Hot Springs, in the State of Arkansas, shows unto your honor that on the first day of March, 1884, the said Hot Springs National Bank was a corporate body created and existing for the purpose and engaged in the business of banking, and having its office of discount and deposit in the city of Hot Springs and State aforesaid. The said corporation was created and organized under the act of Congress of the United States entitled "An act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," and other acts in addition to or amendatory thereof, with a capital stock of fifty thousand dollars, divided into five hundred shares of one hundred dollars 3 each at their par value. The said bank continued to exercise the various powers and privileges conferred upon and granted to it by the several acts of Congress, and carried on the business of banking in Hot Springs aforesaid until the 27th day of May, 1884, when it closed its doors, and then and there suspended the business of banking, and has not resumed the same.

The Comptroller of the Currency, Henry W. Cannon, having become fully satisfied by an examination of its affairs that said bank was insolvent and unable to pay its just debts and liabilities, on the 2d day of June, 1884, duly appointed your orator receiver thereof,

who, having accepted the office, shortly thereafter entered upon the duties which devolved upon him, and took possession of the books, records, and assets of every description, the property of said bank, and since that time has been continuously engaged in the discharge thereof. The said Comptroller of the Currency afterwards, to wit, on
the 25th day of July, A. D. 1884, at the city of Washington,
4 in the District of Columbia, in order to pay and satisfy the
debts and liabilities aforesaid due and owing by said bank, and in the exercise of the powers vested in him by the laws of the United States, did find and determine from evidence which to him was satisfactory that it was necessary to enforce the individual liability of the shareholders in said bank to the amount of fifty per centum of the par value of the capital stock in said association, and did make an order and requisition on the stockholders and each and every one of them equally and rateably as the shares were held and owned by them respectively at the time said bank suspended and ceased to do business, and then and thereby the said comptroller did empower and direct your orator as such receiver to take the necessary legal proceedings to enforce said assessment against the shareholders in said bank and each and every one of them.

And your orator would further state that on the 27th day of May, A. D. 1884, when said bank suspended and ceased to do business,
Amanda M. Cocke, wife of William M. Cocke (both of whom
5 are made defendants hereto), was the owner of one hundred
shares of the capitol stock thereof, of the par value of ten thousand dollars, and the same still stands in her name on the books of the said association, on which the equal and rateable assessment and requisition made by the comptroller as aforesaid is five thousand dollars, with interest thereon from the said 25th day of July, 1884; that said defendant, Amanda, is possessed of property in her own right amply sufficient to pay said assessment, but utterly refuses to do so.

And your orator would further state that in like manner, on the said 27th day of May, Sue Flanagan, wife of James Flanagan (both of whom are also made defendants hereto), was the owner, and there is still standing in her name on the books of the association twelve shares of the capital stock thereof, of the par value of twelve hundred dollars, on which the equal and ratable assessment so ordered by the Comptroller of the Currency is six hundred dollars, with interest
from the said 25th day of July, 1884, which sum she neglects
6 and refuses to pay, though possessed of ample property in her
own right, out of which the same could be paid. All the defendants named herein are citizens of the State of Kentucky and subject to the jurisdiction of this court, and there are no other delinquent shareholders who are citizens or residents of Kentucky, or within the jurisdiction of this court, and for that reason your orator proceeds against the defendants named alone.

In consideration whereof, and for as much as your orator is without adequate remedy in the premises at common law, will your orator require that said defendants, and each of them, make full, true, direct, and perfect answers to all and singular the matters hereinbefore stated and charged as fully as though specially interrogated, and on the final hearing will your honor grant that an account be taken of the shares of stock held by each of said defendants respectively at the date of suspension aforesaid and the assessment and requisition made by the Comptroller of the Currency thereon, that an order and decree be made for the payment thereof out of the separate property held by the said defendants, Amanda and Sue, in their own right as each may be found indebted, with the interest which may have accrued thereon, and grant the further and additional relief to which your orator may be entitled, and he, as in duty bound, will ever pray, &c. 7

MARTIN L. BUNDY,
Receiver of the Hot Springs National Bank.

MELLETT AND BUNDY,
Complainant's Solicitors.
BROWN & DAVIE,
T. B. FAIRLEIGH,
Of Counsel.

STATE OF INDIANA, }
County of Henry, } *ss:*

Martin L. Bundy, the above-named receiver, having first been duly sworn, says he has read the foregoing bill by him signed and is familiar with the contents thereof, and the same is true in substance and matter of fact.

MARTIN L. BUNDY,

Sworn to and subscribed before the undersigned, a notary public, this 29th day of October, 1884.

[SEAL.] JOHN M. MORRIS,
Notary Public.

8 And at a term of our said court held for its February term, 1885, to wit, on Wednesday, February 25th, 1885, came the defendant-, William M. Cocke and Amanda Cocke, by counsel, and filed their demurrer to the bill of complaint herein.

The complainant, by leave of the court, amends his bill of complaint herein by striking out the names of James Flannagan and Sue Flannagan, his wife, as defendants, without prejudice to complainant's right to bring another suit against them or either of them.

It is thefore ordered and adjudged that the defendants, James Flannagan and Sue Flannagan, do recover of the complainant their costs herein expended and incurred, and they may have execution therefor.

The demurrer of Wm. M. Cocke and wife above referred to is as follows, to wit:

Demurrer of Cocke & Wife.

Circuit Court of the United States, District of Kentucky.

9 The joint and several demurrers of William M. Cocke and Amanda Cocke, his wife, to the bill of complaint of William L. Bundy, receiver of the Hot Springs National Bank, of Hot Springs, Arkansas, complainant, exhibited against these defendants and others.

These defendants, by protestation, not confessing all or any of the matters and things in the complainant's bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, do demur thereto, and for cause of demurrer show:

1. That the complainant hath not, by his said bill, made or stated such a case as entitles him in a court of equity to any discovery from these defendants, or to any relief against them as to the matters contained in the said bill or any of said matters.
2. That it appears by the said bill that the same is exhibited against these defendants and the several other persons therein named as defendants thereto for distinct matters and causes, in several whereof, as appears by the said bill, these defendants are 10 not in any manner interested or concerned, and that said bill is altogether multifarious.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, these defendants do demur thereto, and humbly pray the judgment of this honorable court whether they should be compelled to make any further or other answer to the said bill, and pray to be hence dismissed, with their costs and charges in this behalf most wrongfully sustained.

B. F. BUCKNER,
Solicitor for Defendants.

State of Kentucky, *County of Clark:*

William M. Cocke, of full age, being duly sworn according to law, saith that the foregoing demurrer is not interposed for delay, but in good faith, for the causes therein set forth.

Feb'y 24th, 1885.

WM. M. COCKE.

11 Subscribed & sworn to before me this 24th day of February, A. D. 1885. Witness my hand & notarial seal the day above written.

J. W. POYNTER,
Notary Public.

I certify that I have perused the complainant's bill in the above-stated cause and that the above demurrer is well founded in point of law.

B. F. BUCKNER, *Counsel.*

And on another day of said term of our said court, to wit, on Tuesday, July 7th, 1885, came the complainant by Brown, Humphrey & Davie, his counsel; came also the defendants by B. F. Buckner, their counsel.

Death of Def't, A. M. Cocke, sug. & Bill of Rev. Filed & App'nce to Bill Ent'd & Dem'r to Bill Filed.

The complainant, by counsel, suggested to the court the death of the defendant, Amanda M. Cocke, and filed his bill of revivor herein.

Thereupon the defendant, William M. Cocke, by said counsel, entered his appearance to said bill of revivor.

The defendant, William M. Cocke, by said counsel, filed
12 his demurrer to said bill of revivor herein, and by consent of
parties, by their counsel, the verification to said demurrer is
hereby waived.

The bill of revivor above referred to is as follows, to wit:

Bill of Revivor.

In the Circuit Court of the United States for the 6th Circuit & District of Kentucky, at Louisville.

M. L. BUNDY, Receiver for the Hot Springs National Bank, of Hot Springs, Arkansas, Complainant,

vs.

WM. M. COCKE and AMANDA M. COCKE, Defendants.

To the honorable the judges of the circuit court of the United States in and for the 6th circuit and district of Kentucky, in chancery sitting, at Louisville, Ky.:

Humbly complaining, showeth unto your honors, your orator, M.
L. Bundy, receiver of the Hot Springs National Bank, at Hot Springs,
in the State of Arkansas, that heretofore, to wit, on the 4th
13 day of February, 1885, your orator filed in this honorable
court a certain bill of complaint, to which bill of complaint
there were made defendants the following-named persons: Wm. M.
Cocke, Amanda M. Cocke, James Flanagan, and Sue Flanagan.

In and by said bill of complaint your orator did set forth and
show unto your honors that, on the 1st day of March, 1884, the said
Hot Springs National Bank was a corporate body created and existing for the purpose of and engaged in the business of banking, and
having its office of discount and deposit in the city of Hot Springs,
in the State of Arkansas; and that the said corporation was created
and organized under the act of Congress entitled "An act to provide
a national currency secured by pledge of U. S. bonds, and to provide
for the circulation and redemption thereof," and other acts in addition thereto or amendatory thereof, with a capital stock of $50,000,
divided into 500 shares of $100 each at their par value; and
14 that the said bank continued to exercise the various powers
and privileges conferred upon it and granted to it by the several acts of Congress, and carried on the business of banking in Hot
Springs aforesaid until the 27th day of May, 1884, when it closed its
doors and then and there suspended the business of banking, and

has not resumed the same; and that the Comptroller of the Currency, one Henry W. Cannon, having been fully satisfied, by an examination of its affairs, that the said bank was insolvent and unable to pay its just debts and liabilities, did, on the 2d day of June, 1884, duly appoint your orator as receiver thereof, and that your orator, having accepted the office, shortly after did enter upon the duties which devolved upon him, and took possession of the books and records and assets of every description, the property of said bank; and that since said time your orator has been continuously engaged in the discharge of said office of receiver; and that the said
15 Comptroller of the Currency afterwards, to wit, on the 25th July, A. D. 1884, at the city of Washington, in the District of Columbia, in order to pay and satisfy the debts and liabilities aforesaid due and owing by said bank, and in the exercise of the powers vested in him by the laws of the United States, find and determine, from evidence which to him was satisfactory, that it was necessary to enforce the individual liability of the shareholders in said bank to the amount of 50 per centum of the par value of the capital stock in said association, and did make an order and requisition on the stockholders, and each and every one of them, equally and ratably as the shares were held and owned by them respectively at the time said bank suspended and ceased to do business, and then and thereby the said comptroller did empower and direct your orator, as such receiver, to take the necessary legal proceedings to enforce said assessments against the shareholders in said bank and each and every one of them.

16 And further, in the said bill of complaint, your orator did show and state that on the 27th May, A. D. 1884, when the said bank suspended and ceased to do business, Amanda M. Cocke, wife of Wm. M. Cocke, both of whom were made defendants to said bill of complaint, was the owner of 100 shares of capital stock of the par value of $10,000, and the same still stands in her name on the books of the association, on which the equal and ratable assessment and requisition made by the comptroller as aforesaid is $5,000, with interest thereon from said July, 1884.

And further, that said Amanda M. Cocke was and is possessed of property in her own right amply sufficient to pay said assessment, but utterly refuses to do so.

And further, in said bill of complaint, your orator did state that in like manner on said 27th day of May, 1884, Sue Flanagan, wife of James Flanagan, both of whom were also made defendants to said original bill of complaint, was the owner, and there was
17 then still standing in her name on the books of the association 12 shares of the capital stock thereof [of] the par value of $1,200, on which the ratable and equal assessment so ordered by the Comptroller of the Currency is $600, with interest from the said 25th July, 1884, which sum she neglects and refuses to pay, though possessed of ample property in her own right out of which the same could be paid.

And further your orator in said original bill did state and show that all the defendants therein named were and are citizens of the

State of Kentuky, and subject to the jurisdiction of this honorable court, and that there are and were no other delinquent shareholders who are or were citizens or residents of Kentucky, or in the jurisdiction of this court, and for that reason your orator did proceed against the defendants named alone.

And in and by said original bill of complaint your orator
18 did further state he was without adequate remedy in the
premises at common law, and did pray and request of your honors that the said defendants and each of them should make full, true, direct, and perfect answers to all and singular the matters in the said bill of complaint stated and charged as fully as though specifically interrogated, and that on the final hearing your honors would grant that an account should be taken of the shares of stock held by each of said defendants at the date of suspension aforesaid and the assessment and requisition made by the Comptroller of the Currency thereon, and that an order and decree should be made for the payment thereof out of the separate property held by the defendants, Amanda Cocke and Sue Flanagan, in their own right, as each might be found indebted, with the interest which may have accrued
thereon, and for such other and additional relief as your orator
19 might be found entitled to have in the premises.

And your orator further states that thereafter, to wit, on the 25th day of February, 1885, in this honorable court came the defendants to said original bill, namely, Wm. M. Cocke and Amanda M. Cocke, his wife, and filed their joint and several demurrer to said original bill of complaint; likewise, on said 25th February, 1885, came defendants James Flanagan and Sue Flanagan, his wife, and filed their joint and several demurrer to the said original bill of complaint, and your orator states that, the said demurrers being heard, it was upon the hearing of the same held and adjudged by the court that the said original bill of complaint was multifarious in that it joined the defendants Cocke and wife and the defendants Flanagan and wife, and the said demurrer to the bill aforesaid was sustained
on the ground of multifariousness and improper join*d*ure of
20 parties. And thereupon leave was granted by the court to
your orator to amend his said original bill of complaint by dismissing said original bill of complaint as against the defendants, James Flanagan and Sue Flanagan, without prejudice to his right to bring another and different and separate action as and for the said cause of action against the said defendants James Flanagan and Sue Flanagan, and your orator, in pursuance of said leave so given, did dismiss said bill of complaint so far as it was brought against the defendants James Flanagan and Sue Flanagan without prejudice to his bringing another action against the said defendants so dismissed.

And afterwards, on the — day of March, 1885, your orator states that the defendant Amanda M. Cocke departed this life domiciled
and resident in the county of Clark and State of Kentucky
21 and being a citizen of the State of Kentucky. And said
Amanda M. Cocke was legally empowered to make, execute, and publish her last will and testament, and did, prior to her

death, make, execute, and publish, in due form of law, her last will and testament, dated as of the 6th day of November, 1884.

In and by her said last will and testament the said defendant, Amanda M. Cocke, did give and bequeath to her niece, Fannie B. Grigsby, a certain diamond ting and other jewelry, silver plate, and china; and, by the second item, the said Amanda M. Cocke did give and bequeath to her husband, who is the defendant, Wm. M. Cocke, all of the estate of her, the said Amanda M. Cocke, both real and personal, of every description, after the payment of her debts, and after the full settlement of her estate, and did express as her wish and direction that her said husband, the defendant, Wm. M. Cocke, should give to her niece, Fannie B. Grigsby, whatever he might consider as one-fourth (¼) of the net value of all the 22 testator's estate, to be invested in real estate, stocks, or bonds, with provision that she could use the interest or any part thereof, said fund to be for her exclusive benefit, and not subject to the will or control of any husband she might marry, and with full power in her, the said Fannie, to dispose of the same by will to such of her brothers and sisters as she might desire, should she die without issue; and, by the 3rd clause of said will, the said Amanda M. Cocke did direct and request that her said husband, the defendant, Wm. M. Cocke, should, out of the said testator's estate, give to Emily B. Grigsby and Lewis Grigsby another one-fouth (¼) part of the net value of said testator's estate, to be equally divided between them, and to be paid them upon the death of their mother, provided that they should be at that time twenty-one years of age and have living issue, or should either of them die before attaining 23 their majority, and without leaving issue, then their estate so given to go to the survivor of them, and should both die before attaining their majority, and without living issue, then the estate so given to go to the children of said testator's brother, John B. Grigsby, except Fannie B. Grigsby, for whom the testator had before, in the said will, provided.

And further did desire and direct that the estate given in the said 3rd clause should be placed in the hands of a guardian to be appointed by the county court of Clark county, Kentucky, to use the interest alone on the same solely and exclusively for their education.

And in and by the 4th clause of said will the said testator, Amanda M. Cocke, did appoint her husband, Wm. M. Cocke, sold executor of her said last will and testament, and did direct that no bond should be required of him for the faithful execution of the 24 trust so imposed. And your orator states that the said last will and testament of Amanda M. Cocke was afterwards duly proved according to law in and before the county court of the county of Clark and State of Kentucky, and was admitted to record and recorded in said county and in the proper office thereof.

And afterwards, on the 23d day of March, 1885, the defendant Wm. M. Cocke, husband aforesaid of Amanda M. Cocke, and defendant hereto, and the same person named in said will as the executor thereof, did appear in the county court, and in and for the county of Clark and State of Kentucky, and did accept the terms of said will and the provisions therein named, and did take upon himself the execution thereof and the office of executor as therein given him, and took the oath prescribed by law, and entered into and acknowledged himself bound unto the Commonwealth of Kentucky in a bond conditioned according to law.

25 And your orator states that the defendant, Wm. M. Cocke, is the legatee and devisee of the entire estate of Amanda M. Cocke, now deceased, who was the same Amanda M. Cocke named, a defendant to the original bill herein, subject only to the trusts and provisions hereinbefore mentioned; and that the defendant, Wm. M. Cocke, is the sole executor of the last will and testament of the said Amanda M. Cocke, being the same Amanda who is named as defendant to the original bill herein.

Your orator states that by the death of said Amanda M. Cocke the said original bill of complaint was and is abated as against her, and your orator is advised and charges the fact to be that he is entitled to have the same proceedings revived against the said Wm. Cocke as devisee and legatee of Amanda M. Cocke, deceased, and as sole executor of the last will and testament of the said
26 Amanda M. Cocke, deceased, and to have the same so revived in the same plight and condition in which the same were at the time of the death of the said Amanda M. Cocke. To the end, therefore, that the said suit and the proceedings therein may stand revived against the said Wm. M. Cocke as devisee and legatee of Amanda M. Cocke and as sole executor of Amanda M. Cocke, deceased, and be in the same plight and condition as the same were at the time of such abatement, or that the defendant, Wm. M. Cocke, may show good cause to the contrary, and that the defendant, Wm. M. Cocke, may answer the said original bill, and that your orator may have the benefit of said suit, and of all the proceedings therein, and that your orator have relief against the defendant, Wm. M. Cocke, out of and as to any and all assets by him received or held as legatee or devisee of Amanda M. Cocke, or as executor of the last will of Amanda M. Cocke, deceased:

27 May it please your honor-, the premises considered, to grant unto your orator the writ of subpœna to issue out of the office and under the seal of this honorable court, and to be directed to the said Wm. M. Cocke, thereby commanding him at a certain day and under a certain pain and penalty to be therein limited, personally to appear and be before your honors in this honorable court, and then and there to answer the premises and show cause if he can why the said suit and proceedings therein had should not stand and be revived against him, and be in the same plight and condition as the same were at the time of the abatement thereof, and further to stand to and abide such order and decree in the premises as to your honors shall seem meet.

And your orator will ever pray, &c.

Respectfully, BROWN & DAVIE, *Counsel.*

28 The demurrer of Wm. M. Cocke to the bill of revivor filed herein is as follows, to wit:

Demurrer of Cocke to Bill of Revivor.

Circuit Court of the United States, District of Kentucky.

The demurrer of Wm. M. Cocke, executor of the last will and testament of Amanda M. Cocke, dec'd, to the bill of revivor of Martin L. Bundy, receiver of the Hot Springs National Bank of Arkansas, complainant, against this defendant.

This defendant, by protestation, not confessing all or any of the matters and things in the complainant's bill of revivor contained to be true in such manner and form as the same are therein set forth and alleged, does demur thereto, and for cause of demurrer shows:

1. That the complainant hath not in and by his bill of revivor made or stated such a case as entitles him in any court of equity to any discovery from this defendant, or to any relief against
29 him as to the matters and things contained in the said bill of revivor or of any such matters.

Wherefore, and for divers other good causes of demurrer appearing in said bill of revivor, this defendant does demur thereto, & humbly prays the judgment of this honorable court whether he should be compelled to make any further or other answer to said bill, & prays to be hence dismissed with his costs and charges in this behalf most unjustly & wrongfully sustained.

B. F. BUCKNER,
Solicitor for Def't,

STATE OF KY., *County of Clark:*

William M. Cocke, being sworn, says that the foregoing demurrer is not interposed for delay, but in good faith for the cause therein set forth.

—— ——.

Subscribed & sworn to by Wm. M. Cocke before me.

—— ——.

30 I certify that I have perused the complainant's bill of revivor in the above-stated case and that the above demurrer is well founded in point of law.

B. F. BUCKNER, *Counsel.*

And on another day of said term of our said court, to wit, on Wednesday, July 15th, 1885, came the parties by their counsel.

Heard on Demurrer.

This cause coming on to be heard upon the demurrers to the bill of complaint and bill of revivor, and having been argued by counsel, and the court not being advised thereof, takes time.

And on another day of said term of our said court, to wit, on Tuesday, July 28th, 1885, came the parties by their counsel.

The court being now fully advised of the demurrers of defendant to the bill of complaint herein, the court files a written opinion herein.

Opinion Filed.

31 It is therefor, decreed and ordered that said demurrers be, and the same are hereby, sustained, to which the complainant, by his counsel, excepts.

Demur's Sust'd & Comp't Excepts & Leave to Am'd.

It is decreed and ordered that the complainant do have until the 7th day of September, 1885, within which to amend his bill herein.

The written opinion of the court filed herein is as follows, to wit:

Opinion.

BUNDY, Receiver, *vs.* COCKE & Wife.

The assessments against stockholders in national banks by the comptroller is a fixed sum per centum, but, for the reasons given in Kennedy *vs.* Gibson, 8 Wall, courts of equity have jurisdiction when the assessment is less than the whole amount of the possible liability.

This case, which is reaffirmed in U. S. *vs.* Knox, 102 U. S. R., p. 426, settles the question of jurisdiction.

32 The complainant's only allegation in regard to the liability of Mrs. Cocke, the married woman, is this, viz: "And your orator would further state that on the said 27th day of May, A. D. 1884, when said bank suspended and ceased to do business, Amanda M. Cocke, wife of Wm. M. Cocke (both of whom are made defendants hereto), was the owner of one hundred shares of the capital stock thereof, of the par value of $1,000.00, and the same still stands in her name on the books of said association, on which the equal and ratable assessments and requisition made by the comptroller as aforesaid is five thousand dollars, with interest thereon from the said 25th day of July, 1884; that said defendant Amanda is possessed of property in her own right amply sufficient to pay said assessment, but wholly refuses to do so."

This allegation seems to assume that the mere ownership of this stock, although she is a married woman, is sufficient to make 33 her property liable for the assessment of fifty per centum made by the comptroller on the stockholders of the Hot Springs Nat'l Bank.

Section 5133 of the Revised Statutes provides that associations for the carrying on of the business of banking may be formed " by any number of natural persons, not less in any case than five." And section 5151 provided that " the shareholders of every national banking association shall be held individually responsible equally and ratably, and not one for another, for all contracts, debts, and engagements of such association to the extent of the amount of their stock therein at the par value thereof in addition to the amount invested in such shares."

I do not think that by the use of the words "natural persons" in the first-mentioned section Congress intended to authorize every natural person without regard to their capacity to contract to form a banking association. The language excludes corporations
34 which are artificial persons, but does not include natural persons entirely incapable of creating a liability upon themselves or upon property. Neither do I think that the individual responsibility of stockholders, mentioned in section 5151, is dependent upon their capacity to contract at the time of the assessment.

This is a liability which arises from the relation of stockholders and the assessment may be made against him or her, although at the time the stockholder may not have the capacity to contract; but, as the liability to asssessment by the comptroller arises from the relation of stockholders, there must have existed at the time he or she became a stockholder a capacity to become liable therefor.

I am inclined to the opinion that it may not only be the capacity to become individually responsible, but the right and authority to charge property will be sufficient.

If the transferee of the stock has not the legal capacity to become responsible personally, or make property responsible, this
35 liability to assessment would likely remain in the transferrer.

Again, there might be instances when the acts of a wife in regard to such stocks might make her husband responsible, but I need not consider this question now.

The bill is therefore defective, and the demurrer will be sustained, with costs.

Complainant may amend, if he desires, by the Sept. rules.

And on another day of said term of our said court, to wit, on Tuesday, August 4th, 1885, came the parties, by their counsel.

Bill Dismissed & Judg't for Costs, & Appeal Prayed & Granted.

The complainant declining to amend his bill of complaint herein, it is therefore decreed and ordered that the complainant's bill of complaint be, and the same is hereby, dismissed, and that the defendants recover of the complainants their costs herein expended.

Appeal Prayed.

Thereupon the complainant, by counsel, upon the request of
36 the Comptroller of the Currency, prays an appeal from the above decree to the Supreme Court of the United States, which is granted.

37 DISTRICT OF KENTUCKY, *ss:*

I, Samuel B. Crail, clerk of the circuit court of the United States for the district aforesaid, at Louisville, do hereby certify that the foregoing thirty-six pages contain a true and complete transcript of the record of the proceedings had in the court in the case mentioned in the caption hereof.

Witness my hand and the seal of said court this 10th day of September, 1885.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

SAM'L B. CRAIL, *Clerk.*

Fee for transcript, $11.15.

Endorsed on cover: Kentucky C. C. U. S. No. 602. M. L. Bundy, receiver of the Hot Springs National Bank, of Hot Springs, Arkansas, appellant, *vs.* William M. Cocke. Filed September 21, 1885.

In the Supreme Court of the United States.

OCTOBER TERM, 1886.

M. L. BUNDY, RECEIVER, &c.,
appellant,
vs.
WILLIAM M. COCKE.

No. 602.

In the Supreme Court of the United States.

OCTOBER TERM, 1886.

M. L. BUNDY, RECEIVER, &c., appellant, *vs.* WILLIAM M. COCKE.	No. 602.

Comes the Attorney-General of the United States and presents a copy of a letter, and of its enclosure, from the Secretary of the Treasury, showing the importance of this case and the necessity of an early decision therein, and he makes such correspondence a part of this motion, and moves the court to advance said cause on the docket and assign it for argument and submission at an early day.

A. H. GARLAND,
Attorney-General.

TREASURY DEPARTMENT,
December 7, 1886.

The honorable the ATTORNEY-GENERAL:

SIR: I have the honor to inclose herewith copy of letter dated 4th instant, from the Acting Comptroller of the

Currency, setting forth the importance of having the case of *Bundy, receiver*, vs. *Cocke*, No. 602 of the Supreme Court docket, advanced. This is the second communication from the Comptroller on this subject, and I have no doubt that the early settlement of the question involved is of great importance to his office and to the public generally.

I will thank you, therefore, to take the necessary action to have the cause advanced for argument in said court.

Respectfully, yours,

C. S. FAIRCHILD,
Acting Secretary.

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
Washington, December 4, 1886.

HON. DANIEL MANNING,
Secretary of the Treasury.

SIR: I have the honor to inclose herewith an original letter dated the 3d instant, written by the honorable Attorney-General, and handed to me by Mr. A. L. Bundy, receiver of the Hot Springs National Bank, of Hot Springs, Ark., insolvent.

The case of *Bundy, receiver*, v. *Cocke*, referred to, is on appeal in the Supreme Court of the United States, and the point involved in the case is as to whether a "feme covert" holding stock in a national bank can be made to pay the assessment to which the law subjects all holders of national-bank stock.

I may say that the settlement of this question is of great importance and is not covered by a decision of the Supreme Court, while the decisions in lower courts are conflicting. There is a similar case now pending in the Supreme Court, the decision of which will depend upon the decision of the case now under consideration. In view of the fact that there are so many married women becoming stockholders in national banks, it is a matter of great importance to me to have the question of their liability under the provisions of section 5151 of the Revised Statutes of the United States speedily determined.

The matter is therefore submitted to you for such action as may be deemed proper.

Very respectfully,

V. P. SNYDER,
Deputy and Acting Comptroller.

Office Supreme Court U. S.
FILED
MAR [illegible] 1888
JAMES H. McKENNEY,
Cl'k.

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 301

M. L. BUNDY, Receiver of the Hot Springs National Bank, - - - - - - - - - - Appellant,

VERSUS

WILLIAM M. COCKE, - - - - - - - - Defendant.

APPEAL FROM CIRCUIT COURT OF THE UNITED STATES
FOR THE DISTRICT OF KENTUCKY.

BROWN, HUMPHREY & DAVIE,
Attorneys for Appellant.

JOHN P. MORTON & CO., PRINTERS, LOUISVILLE.

Supreme Court of the United States.

OCTOBER TERM, 1887.

M. L. BUNDY, RECEIVER OF THE HOT SPRINGS NATIONAL BANK, OF HOT SPRINGS, ARKANSAS, ... *Appellant,*

VERSUS } No. 301.

WILLIAM M. COCKE, ... *Appellee.*

Brief for Appellant.

THE QUESTION INVOLVED.

The question upon which this appeal is founded may be briefly stated thus:

Can a married woman who has acquired stock in a national bank, and has been registered as a stockholder, be held to contribution under the personal-liability clause of the national banking law; the insolvency of the bank having been properly ascertained and declared by the Comptroller of the Currency?

Or, does her coverture, existing at the time of her acquiring such stock, relieve her from the statutory personal liability in respect of that stock, declared by section 5151 of the Revised Statutes of the United States?

THE FACTS.

This case went off on demurrers, and there is no controversy as to the facts.

The Hot Springs National Bank, duly authorized under the national banking law, suspended business in May, 1884.

The Comptroller of the Currency, after an examination of its affairs, declared it insolvent, and appointed the appellant Receiver. He accepted and qualified as such. The Comptroller, proceeding as the statute requires, ascertained that, in order to pay the bank's indebtedness, it would be necessary to assess the stockholders at the rate of fifty per cent on the par value of their respective holdings, under the personal liability declared by section 5151 of the Revised Statutes of the United States.

An assessment was accordingly made, and the Receiver directed to collect it. Among the registered stockholders was Mrs. Amanda M. Cocke, wife of the present appellee, and the original defendant to this action. When she bought the stock she was covert, and it was transferred directly into her name.

She possessed ample property in her own right to make good the five-thousand-dollar assessment and interest, in respect of her stock, but refused the demand made by the Receiver. The Receiver, under the direction of the Comptroller of the Currency, thereupon instituted this suit by a bill in equity, filed in the Circuit Court of the United States for the District of Kentucky.

The original bill was framed to include as defendants all the stockholders who were citizens of Kentucky, and, on that ground, was demurred to as the demurrer avers. (See printed Record, page 4, second ground of demurrer.)

The court sustained this objection, and the appellant amended the bill by striking out all of the defendants, saving Mrs. Cocke and her husband, the present appellee.

At a later date the death of Mrs. Cocke was suggested of record, and a bill of revivor filed, to which her husband, the present appellee, appeared, and demurred for want of equity. Argument having been heard, the circuit court sustained the demurrers to the original bill and the bill of revivor. The appellant declined to amend, and the bill was dismissed.

The pleadings in the case set forth the holding of the stock by Mrs. Cocke; the registry of it in her name; the action taken by the Comptroller in ascertaining and declaring the insolvency of the bank; the making of the assessment upon the stockholders, and in appointing and instructing the Receiver. The possession by Mrs. Cocke of property of her own ample to meet the assessment was averred. The bill of revivor set forth the death of Mrs. Cocke pending the suit; her power to make a will; the provisions of the will made by her; its probate; the appointment and qualification of her husband as sole executor; his designation as residuary legatee; his assent to the will; his receipt of assets as sole legatee, and also as executor in excess of the assessment.

The prayer of the original bill was for a decree enforcing payment of the assessment, with interest, "out of her separate property held" by Mrs. Cocke "in her own right." The bill of revivor sought that the appellee, W. M. Cocke, should answer the original bill, and that appellant might have relief against him, "out of and as to any and all assets by him received and held as legatee or devisee of Amanda M. Cocke, or as executor of the last will of Amanda M. Cocke, deceased."

The circuit court delivered a written opinion concerning the critical question of liability. It was announced as the view of the court that the liability of Mrs. Cocke, upon the assessment made by the Comptroller, and interest thereon, depended upon her capacity at the time of acquiring the stock to contract for the liability; consequently her coverture at the time of becoming a stockholder, inasmuch as it disabled her from contracting, protected her from liability to contribution in respect of her stock.

That this is the reasoning, and indeed almost the language of the court will be seen by reference to the opinion. (See printed Record, page 12.)

It will thus appear that the question presented by this appeal for the consideration of the court is, as already indicated, "Does the disability of coverture protect a female stockholder in a national bank from personal liability to contribute in respect of her stock to repair the insolvency of the bank?"

We shall endeavor to show that the rule of liability is not varied in the case of a married woman from the general provision of the statute.

POINTS AND AUTHORITIES.

For the appellant, Receiver of the insolvent bank, we contend:

1. That the action, being for a *pro rata* contribution, was properly by bill in equity under the authority of Kennedy v. Gibson, 8 Wallace. And that to such a bill all the stockholders within the jurisdiction were proper parties defendant. (U. S. v. Knox, 102 U. S. 423.)

2. That there is no rule of law forbidding *feme covert* to become a stockholder in a national bank, or to have bank stock transferred into her own name. In the absence of a prohibitory statute such a holding is admissible. (See DeGex, Fisher & Jones, 543, Luard's case; Law Reports, 7 Equity, 16, Butler v. Cumpston; Law Reports, 3d Equity, 781, Matthewson's case; 17 Mass., 59, Stanwood v. Stanwood; 17 Maine, 29, Winslow v. Crocker; 5 Foster, New Hampshire, 340, Wells v. Tyler.)

3. That the national bank act expressly authorizes "any number of natural persons" to organize and subscribe for stock in a national bank (Revised Statutes of the U. S., section 5133), and that a *feme covert* may consequently become a stockholder.

4. It is a historical fact that the national banking law was in many particulars, and especially in the feature of the stockholder's personal liability, modeled upon the banking law of the State of New York, and the incorporation into the United States act of the New York provision for personal liability carried with it by fair construction the interpretation

at that time given by the Appellate Court of New York to the New York statute of personal liability.

5. That personal liability to contribute in case of the insolvency of the bank consequently attaches to a *feme covert* equally with other stockholders.

6. And that this results as well from the words of the statute which, in express terms, apply to all registered stockholders (see Revised Statutes of the United States, section 5151) as from all the cases, notably that of the Reciprocity Bank, 22 N. Y., page 1; Irons v. Manufacturers National Bank of Chicago, 17 Fed. R. 315, 316.

7. That the liability of a *feme covert* manifestly attaches to her estate in the hands of her executor and residuary legatee.

THE ARGUMENT.

It was much insisted in the circuit court that this proceeding by bill in equity was untenable, and that an action at law for debt was the proper course for the Receiver to pursue.

It seems a sufficient answer to any such contention to note that the claim made by the Receiver, being for less than the par value of the stock, comes directly within the decision in Kennedy v. Gibson, 8 Wallace, 505.

Had the claim been for the full par value the suit must, under that authority, have been brought at law. And that all the stockholders within the Federal district were properly joined in the Receiver's equitable action seems beyond question, if effect is to be given to the precedent of U. S. v. Knox, 102 U. S. 423.

The appellant, having severed the defendants in compliance with the ruling of the Federal court on the demurrer for multifariousness, makes here no question as to the propriety of joinder of defendants.

From the opinion of the circuit court it will be seen the case went off on the question of liability in contribution of a *feme covert* stockholder.

By the appellee's counsel it was earnestly contended that a *feme covert* could not, because of her coverture, contract at all or own any personal property, and that under the ancient common law, still in force as was argued, she could not hold bank stock, and that bank stock, if she acquired it, became instantly the property of her husband. The chief modern authority relied on by appellee's counsel in the argument below was Luard's case, 1 De Gex, Fisher & Jones, 543.

We apprehend, however, that a careful consideration of that authority will be made decidedly for the appellant, and will show not only that a *feme covert* can be a stockholder, but that her liability to contribute to repair the insolvency of the corporation may be enforced against her estate.

The facts set out in the report of Luard's case show that the *feme covert* was a registered stockholder; that a clause in the deed of settlement (which answers in England to a charter) provided that all stockholders should be liable for assessments to make good the debts of the corporation in excess of its assets, and there was no prohibition either in the deed of settlement or in the Company's Act of Parliament prohibitory of a married woman becoming a stockholder. (See 1 De Gex, Fisher & Jones, 546.)

The case was very ably argued in behalf of the *feme covert* by Sir Hugh Cairns, who contended that the disability of coverture protected his client from all liability connected with her contract or subscription. His contention, however, was unavailing. Lord Justice Turner, treating the contract as a statutory one, refused to give effect to the plea of coverture, and directed the general as well as the separate estate of the *feme covert* to be held liable to the assessment in contribution. (See 1 De Gex, Fisher & Jones, 548.)

A similar question came before Vice-Chancellor Malins, in Butler v. Cumpston, in Law Reports, 7th Equity, 16.

It there appeared that a *feme covert* had subscribed for eleven shares of the capital stock of the corporatien. She was sued for a *pro rata* contribution to repair the insolvency of the corporation.

It was urged in her behalf, that being covert at the time of the subscription her disability protected her from the binding effect of that contract, and from all liability incident thereto.

But the Vice-Chancellor held, there being nothing in the company's act to exclude a *feme covert* from becoming a shareholder, she could become such; and being such must bear the liability incident to holding stock. He therefore directed the enforcement of the contribution against her. (See Law Reports, 7 Equity, 21 Butler v. Cumpston.)

Another apposite English case is that of Mrs. Matthewson. (Law Reports, 3d Equity, 781.) In that case Vice-Chancellor Kindersley placed a married woman on the list of contributors to make good a deficit of the corporation assets. It was held by him that, there being nothing prohibitory in the corporation deed of settlement or charter, a married woman could become a stockholder in her own right so as to bind her separate estate, and that, having been a stockholder, her estate was properly subject to contribution to make good the deficit of corporation assets. (See Law Reports, 3 Equity, 781, Matthewson's case.)

It is to be observed as to these English cases, that in none of them is there any reliance upon an express power to contract given to the *feme covert*. On the contrary, her right to own stock is assumed from the absence of any prohibition as well as from the general terms in which the right to subscribe is given to all persons, and from this right to own stock is deduced the correlative liability to assessment.

In the absence of an enabling statute it has been frequently held in the United States, that a *feme covert* may acquire and hold bank stock. Aside from the husband's right to reduce to possession, and so transfer the ownership to himself, stock registered in a *feme covert's* name has been uniformily secured to her.

Thus, in Massachusetts, Chief Justice Parker sustained a *feme covert's* title against the executor of her husband, holding that the husband's failure to reduce to possession and his suffering the bank stock to stand in his wife's name fully entitled her to it. (Stanwood v. Stanwood, 17 Mass. 59.)

In Maine the same ruling has been followed. (See Winslow v. Crocker, 17 Maine, 29.)

Also in New Hampshire the court held, that although there was no permissive statute under which she could acquire and hold it, there was nothing abhorrent to the law or to justice in a married woman's acquiring bank stock. (See Wells v. Tyler, 5 Foster, N. H. 340.)

Similar rulings have frequently been made in Rhode Island and other States.

The application of these precedents to the present case is easier because of the national bank act. That statute provides in its 1st section (Revised Statutes of the U. S. section 5133) that banking associations may be formed by "any number of natural persons not less than five." Certainly no prohibition can be inferred from such language further than to exclude subscriptions to stock by corporate bodies. Again, it is provided in another section that such natural persons "shall set out in articles the number of shares held by them, together with their respective names and places of residence." (Revised Statutes, section 5134.)

The transfer of stock is provided for by still another section (Revised Statutes of the U. S., section 5139), by which it is enacted that "every person" becoming a shareholder by transfer shall, in the proportion to the stock so acquired, "succeed to all the rights and liabilities of the prior holder." (Revised Statutes of the U. S., section 5139.) And by a further provision it is enacted that "shareholders of every national banking association shall be held individually responsible, equally and ratably; and not one for another, for all contracts, debts, and engagements of such association to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares." (Revised Statutes of the U. S., section 5151.)

The phraseology of the national banking law therefore seems, as we contend, to fully warrant the application of the authorities already referred to.

And we submit that on the face of the statute, a *feme covert* being within every intendment of law and rule of construction a natural person, is entitled to become a stockholder, and being so entitled the conclusion can not be escaped that she shares with her co-stockholders the personal liability incident to the disaster that attended the bank.

The history of the national bank act is well known, and we submit that it can be referred to as part of the public history of the country, in fact, as one of the most important incidents in the financial management of the affairs of the government.

The perfection shown by this act, in all its parts and details, at its very first launching into public service, was esteemed one of the most marvelous feats of finance and statesmanship. There has never been in the history of finance a more successful stroke than was the national bank act and the establishment of public credit thereon. But no genius, however great, does every thing unassisted by others, nor did Mr. Chase in drafting the national banking law. Mr. Chase drew the national bank act very largely from the New York banking act, availing himself of that admirable model because it was the outcome of many years' experience and judicious legislation, as also judicial interpretation had in the principal commercial center of the country.

The received construction of the New York banking law was evidently in the mind of Mr. Chase at the time he drew the national bank act, and must form a powerful argument for subsequent interpretation of the national banking law. The national banking law went into effect on the 3d of June, 1863.

It had, of course, been under consideration and in progress of preparation for a year or more, and it had been under debate in Congress for some time. It had been matured with great care, and we may indulge the presumption that Mr. Chase possibly commenced his deliberations on it in 1862. At that time there was fresh before the country, and more particularly fresh in the minds of those engaged in large financial enterprises, the decision, recently rendered in the highest court of judicature in the State of New York, interpreting the most important clause of the New York banking law; in fact, interpreting the clause which is incorporated into the national bank act. It is not an unwarrantable conclusion that this decision, which was in the matter of the Reciprocity Bank, and reported in 22d New York Reports, page 1, was regarded as settling the effect of the phraseology of the individual-liability feature. It was rendered early in 1861, at the close of the October term of 1860.

By reference to the report in that case, the court will find not only quite an extensive history of the progress of the banking law in the State of New York, but also a great deal of learning on the subject of the invasion of charter and right of legislative control. What concerns us, however, in the case at bar, is the attitude of certain female defendants who appeared in the record.

The law of New York, as has been observed, enforces personal liability in words similar to and, we believe, identical with the words incorporated into the national bank act.

Suit was brought to enforce this liability for the purpose of raising money wherewith to supply a deficit caused by the failure of the Reciprocity Bank. Two, at least, of the defendants to the bill were females. One of them was Mrs. Lansing, a *feme covert.* She had, while unmarried, become the owner of some shares of stock, and after her marriage the stock still stood in her name, and she had received dividends thereon. Another lady, Mrs. Dann, was a *feme covert* who appeared to be the holder of some two hundred and sixty-three shares of stock standing in her name up to the day before the bank suspended. It is not in so many words stated in the report that Mrs. Dann purchased her stock during coverture, but, from the fact that Mrs. Lansing is carefully stated to have purchased hers while single, it may well be inferred that the latter fact would not have been held back as to Mrs. Dann had such fact existed.

The question was whether those two married women should be compelled to contribute along with the other stockholders to make good the deficit of the bank assets. The New York court perfectly recognized the right of the husbands to reduce to possession, if they have chosen to do so, the shares of stock which stood in their wives' names; but Mrs. Lansing's husband never attempted to reduce to possession, and Mrs. Dann's husband only did it the day before the bank suspended, and in fraud of the creditors of the bank, himself being irresponsible. The New York court, in the case referred to, deals with the question fully as to the liability of these married women. The following quotation may be permitted from the opinion:

> "It is insisted that she (that is Mrs. Lansing) is not liable to be assessed in respect of this stock to pay the creditors of the bank. The question may not be entirely free from doubt, but our conclusion is that the assessment upon her was lawfully made. The rule of the common law was that choses in action, including shares of stock, by reason of their resemblance to that description of property owned by a woman at the time of her marriage continued to be her property after marriage until reduced to possession by her husband. The statute of 1848, for the protection of the rights of married women, it seems did not and could not constitutionally take from the husband this right of reducing to possession where the right became vested by the marriage prior to the passage of the act. (Westervelt v. Gregg, 2 Kernan, 202.) But Mr. Lansing never exercised the right in respect of the shares in question. They remained therefore her property after marriage as before. She continued, a stockholder, and as such was liable to assessment by the terms of the statute under which these proceedings were had. The legislature, if it had thought proper to do so, might have made an exception in favor of married women, but no such exception was made. It is said Mrs. Lansing, being under the disabilities of coverture, could not make a transfer of her shares, and so avoid this liability, if she had wished to do so. This is a circum-

stance which might have been properly addressed to the legislative discretion, if indeed the legislature had any discretion under the injunction of the constitution, but it does not authorize the courts to allow an exception where neither the constitution nor the law has declared any. It is also said that *femes covert* are not liable to suits and judgments at common law; and in general this is true. It is also true that the apportionment of liability among stockholders of banks, when duly confirmed, becomes a judgment against each stockholder, to be enforced by execution as in other cases. But it was competent for the legislature to depart from the rules and analogies of the common law and make married women and their estates liable in this proceeding as other shareholders in banks are made liable. This, it seems to us, has been done, and it seems to us proper to add that we see no reason why it ought not to be done in order to effectuate the policy on which the constitution and statute are founded. It might go far to defeat that policy if married women could take and hold stock without liability to creditors."

"Mrs. Dann was also a married woman, and she was assessed in respect of 263 shares of stock, which stood in her name until the day before the bank suspended payment. It appears very clearly that she had separate property derived from the estate of her father, which was vested in trustees. That property was surrendered to her by the trustees after the statutes of 1848 and 1849 concerning the rights of married women were passed, and from that time it was managed by her husband. Some portion of the fund was invested by him in those shares of stock. It also appears that the day before the failure of the bank she transferred the shares to her husband. This transfer seems to have been without any consideration, and the referee found it was made with the attempt to evade the liability of Mrs. Dann as a stockholder to the creditors of the institution. We think, therefore, that she was properly included in the assessment." (See 22 New York Reports, 15, 16.)

The conclusion arrived at by the New York court was that these married women should be placed on the list of contributors and compelled to contribute *pro rata* with other stockholders, and a peremptory order to that effect was sent down to the Supreme Court with directions to give judgment in accordance with the conclusion reached.

Now this decision of the New York Court of Appeals was the last judicial interpretation of the personal-liability clause of the banking law of New York that had been rendered prior to the incorporation of that clause by Mr. Chase in the national bank act. Public opinion had become fixed upon this point by Judge Comstock's opinion in 22d New York. The financial opinion of the country was settled by that adjudication. It would seem reasonable, therefore, and more than probable, that these facts conspired to induce Mr. Chase to incorporate the personal-liability clause as so expounded into his draft of the national statute.

Our argument, therefore, is, that under the authority of contemporaneous judicial exposition a *feme covert*, registered as a stockholder, comes under the statute liability incident to all stockholders. And it might here be remarked, in passing, that, in addition to the perfect right of married women to own stock in a bank, courts of equity have gone so far as to compel the registration of stock in a corporation in their name.

It was even held in Queen v. Carnatick Railway Company, Law Reports 8, Queen's Bench, 299, that mandamus will lie to compel the registry of shares in the name of a married woman.

We are not aware that the national banking law has been formally construed as to the liability of a *feme covert* stockholder in more than a single case. On the 26th of June, 1883, the Supreme Court of the District of Columbia, in the case of Kayser v. Jane C. Hitz, rendered an opinion of which the following synopsis only is accessible to counsel:

> "Where a woman holding savings bank stock, acquired by deed or gift from her husband, agrees, with his consent, to convert the stock into national bank stock, although still holding it subject to marital rights, she is liable to assessment as a stockholder and must pay such assessments from her own estate. If the transfer to her and subsequent conversion were without her knowledge, it might be otherwise. The liability thus incurred by the holder of national bank stock is statutory and not by contract; being so, it attaches incident to . . . the ownership of all those who are capable

> of such ownership without reference to any supposed voluntary assumption by contract express or implied. Therefore, when national bank stock is held by a *feme covert*, either in her own right or subject to marital rights of her husband, the liability to pay assessments affects her, and it is not necessary in an action to enforce collection of the assessment to join her husband, as would be necessary if it were a common-law obligation or liability of the wife."

Officers of the Government, charged with the administration and execution of the national bank act, have uniformly proceeded upon this construction. It is embodied by the Comptroller of the Currency in his report for 1884, on page xcviii.

Although the point of *feme-covert* liability in this regard has not been directly before this honorable court, we think that certain utterances of this court leave but little doubt as to what is the view of its members.

Mr. Justice Matthews, in Richmond v. Irons, 121 U. S., page 48, uses language which seems to us quite to justify our contention. In speaking of the personal-liability clause of the national bank act, he says, speaking for the unanimous court:

> "Section 5151 imposes upon shareholders of every national banking association an individual responsibility for all its contracts, debts, and engagements, and the terms in which the obligation is created are unconditional and unqualified, except that the liability shall be equal and ratable among the shareholders." (See 121 U. S., 48 at middle.)

That case commenced in the Circuit Court of the United States at Chicago in the case of Irons v. Manufacturers National Bank of Chicago, 17 Fed. R. 308, and in deciding that case Judge Blodgett uses words which seem to uphold our contention:

> "The obvious intent and purpose of the national banking act was to make every stockholder liable to the extent of the amount of stock held by him at the par value thereof, in addition to the amount invested by him in such shares. This stockholder's liability was one of the securities which these

institutions gave to those who might become their creditors, and I never doubted that if a case should come before the Supreme Court where the Comptroller had acquired no right, or exercised no right, if he acquired one, to appoint a receiver under the power delegated to him by law, and yet it was found necessary, in order to pay the debts, to resort to the stockholder's liability, that the court would say that the power to enforce such liability rested in a court of equity and could be enforced through the court. It seems to me so palpable that this stockholder's liability was one of the securities to the public in dealing with the bank, that the court would have been astute if necessary to find means of enforcing such liability, whenever necessary for doing so exhibited itself; and I therefore never doubted that, even if the act of June, 1876, had not been passed, the creditors of a national bank could have reached the stockholders, when necessary, through the aid of a court of equity adapting itself by its flexible methods to all the necessities of the case. I can not believe that the court would have allowed the benefit of this liability of stockholders to be lost to creditors merely because Congress had not specifically directed how this liability was in all cases to be enforced." (17 Fed. R. 312, 313.)

In another case, growing out of the same bank failure, to wit, Irons v. Manufacturers Bank, 21 Fed. R., Judge Blodgett uses this language:

"Whoever became a shareholder assumed this liability as an element of his contract. He is declared individually responsible for the liabilities of the bank to the extent of the amount of his stock at the par value thereof, and this responsibility attaches as soon as the relation of shareholder is assumed and continues until the relation ceases. My view is that Congress intended to give to all persons dealing with the bank the guaranty or assurance of this shareholder's liability for the purpose of giving credit to banks organized under this law. The capital paid in shares might be lost or wasted by fraud or bad management, but this additional shareholder's liability could not be wasted, but remains as a fund to be resorted to for the payment of the debts when other means of payment are exhausted, and it certainly would very much abridge the security if the liability of the shareholder is to cease with his death. It seems to me to be a liability which survives against the estate of the deceased shareholder to the same extent as if the shareholder had, at the time he subscribed to or acquired his stock, signed a written agreement to pay an amount equal to the par value of his stock on the debts or liabilities of the association when called upon by the receiver of the bank to do so, and such an agreement would undoubtedly survive against the representatives of the shareholder's estate." (See 21 Fed. R. 199.)

In addition to all these considerations we venture to suggest that the bill of revivor presents a state of case that will hardly warrant the surviving husband in defeating the satisfaction of the liability clause out of the assets of his wife's estate. Mrs. Cocke is dead. She has left her will. She had authority by law to make a will. It was probated under the laws of the State of Kentucky. By it she has disposed of a valuable estate, first making some bequests and legacies, and then casting the residuary upon her husband as general legatee. She has made him executor, and directed that he qualify as such without giving bond or security of any kind. He has consented to this will if his consent were necessary. He has proved the will in the county court and put it to record. He has accepted the office of executor and qualified as such. He has taken the residuary estate. He holds in his hands as residuary legatee more than enough by far to satisfy the claims of the Receiver in this case. He holds in his hands as executor far more than is necessary for the purposes of this action.

We submit that he who permitted his wife to acquire bank stock, and counseled and advised her in its purchase, as we may gather from the argument of his counsel; who assented to if he did not suggest the registry of the stock in her name, and never by word or deed intimated any dissent; who never took any steps toward the reduction to possession of the stock; comes with very bad grace as an objector to the satisfaction of the liability clause of the statute out of that separate estate which was his wife's.

She certainly had the right to contract. It has not been intimated on behalf of appellee that there is any inhibition in Kentucky upon Mrs. Cocke becoming a stockholder in a national bank. There is no statute affecting such a proposition. If, however, it be contended, as was suggested in the circuit court, that the contract was an Arkansas contract because of the location of the bank at Hot Springs, in that State, then the appellee is confronted by statute which seems to meet the case. The Digest of the Statutes of Arkansas, published by authority of the General Assembly of that State in 1874, contains the following provisions:

> "Sec. 4194. A married woman may bargain, sell, assign, and transfer her separate personal property, and carry on any trade or business, and perform any labor or services on her sole and separate account; and the earnings of any married woman from her trade, business, labor, or services, shall be her sole and separate property, and may be used or invested by her in her own name, and she may alone be sued in the courts of this State on account of said property, business, or services." (Digest Arkansas Statutes, chapter 93, page 756.)

The *argumentum ab inconvenienti* might perhaps be applied in the consideration of this case. It is very easy to imagine a subscription to stock by men who afterwards might transfer that stock to their wives, reserving only ten shares each, the amount necessary to qualify them as directors. A case might thus arise (and if the original purpose were fraud and swindling, could easily arise) where all the stock but the small proportion of ten shares to each director might be held by *femes covert*. If the contention of the appellee is to prevail, then the personal-liability clause of the statute would be absolutely ineffectual in such a case, and we submit that it would be practically to defeat the statute, and to open the way by almost positive invitation to fraud by declaring such a thing possible. We do not perceive how full effect can be given to the national banking act and that full security preserved to creditors of national banks which the law contemplates, and which is the very foundation of the solidity of the system, without making the rule of personal liability inexorable, and, as remarked by Justice Mathews, applicable without exception to each and every stockholder.

We respectfully ask of the court a reversal of the decree of the circuit court dismissing the bill.

JOHN MASON BROWN.

Alex. P. Humphrey,
George M. Davie,
Of Counsel.

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FILED
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JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1888.

M. L. BUNDY, Receiver of **HOT SPRINGS NATIONAL BANK**, Appellant,

vs.

WILLIAM A. COCKE, Defendant.

SUPPLEMENTAL BRIEF FOR APPELLANT.

ALEX. P. HUMPHREY,
GEORGE M. DAVIS,
Of Counsel.

JOHN MASON BROWN,
For Appellant.

IN THE

Supreme Court of the United States.

October Term 1888.

M. L. Bundy, Receiver of the Hot Springs National Bank,
vs.
William M. Cocke.

Supplemental Brief for Appellant.

The briefs in this cause were prepared for a former term of this court, as will appear from the changes in the docket numbers on the Transcript of the Record.

The current of decision has furnished authorities which did not then exist, and to which, by way of supplemental brief, we beg leave to refer.

19 Blatchford, 359, *Hobart* v. *Johnson*, decided by Mr. Justice Blatchford in the Circuit Court of the United States for the Southern District of New York, distinctly holds that a *feme-covert* stockholder in a National Bank is liable as any other stockholder.

> "She will not be allowed to claim and enjoy, as regards the bank and creditors and her co-stockholders, the benefit of her position as a shareholder, and then repudiate the statutory obligation attached to it."
>
> *19 Blatchford, 362.*

The learned Justice cites in support of this conclusion cases already brought to the court's attention in our brief, viz., *Mrs. Matthewman's Case, L. R., 3 Equity Cases, 781*, and *The Reciprocity Bank Case, 22 New York.*

The same decision is announced by Judge Wheeler in Circuit Court United States for Vermont.

Witters v. *Sowles, 35 Fed. Rep., 641.*

And the Supreme Court of Rhode Island, in *Sayles, &c.,* v. *Bates, &c.*, decided in 1886, and found in *5 Atlantic Reporter, 497*, lays down the same law as governing stock liability in cases of State banks.

It is insisted with much earnestness, by counsel for appellee in his brief, that this action is not maintainable in equity.

Upon this point there is no statutory direction, and the profession have naturally been guided by decision and precedent as far as such existed.

In *Kennedy* v. *Gibson, 8 Wall., 498*, Mr. Justice Swayne draws a distinction as to the circumstances which will require equitable or common-law proceedings against the stockholder:

> "The limit of their [the stockholders'] liability is the par of the stock held by each one. Where the *whole amount* is sought to be recovered *the proceeding must be at law.* Where *less* is required the proceeding *may be in equity.*"
>
> *8 Wall., p. 505.*

In *102 U. S., United States* v. *Knox*, the case, as stated by Mr. Justice Swayne, shows that—

> "The comptroller assessed each shareholder seventy per cent. upon the par value of each share of his stock, and ordered the receiver to collect

> the assessment. This the receiver proceeded to do by filing a bill in equity in the Circuit Court of the United States for the District of Louisiana against all the shareholders. Thereafter he obtained a decree against all the defendants severally who were within the jurisdiction of the court for the amount due from each one according to the assessment, and the cause was thereupon continued to await any further assessment the comptroller might deem it proper to make."
>
> See *102 U. S., page 423, U. S.* v. *Knox.*

This court thus sanctioned the mode so adopted, and the bill in the case at bar was framed in accordance with practice thus authoritatively endorsed.

The cases in 19 Blatchford, 362, decided by Mr. Justice Blatchford, and in *17 Federal Reporter, 508, Price* v. *Abbott* decided by Mr. Justice Gray, were each instances where the comptroller assessed the full 100 per cent. of stock liability, and of course were at law.

We submit that the reason of the rule, as we deduce it to be, that the suit for full 100 per cent. must be at law, and when for a less percentage may (or rather should) be in equity, is this: That there remains with the comptroller full power to levy one or more assessments from time to time as the necessities of the particular case may indicate, and in this lies the propriety of keeping the case open for equitable adjustments of the contributions, for, as stated by Mr. Justice Swayne, the assessment, though correctly computed, may not practically yield the needed funds, and some of the assessed stockholders may prove wholly insolvent or partially unable to respond. In that event another and further equitable apportionment (within the limit of the par value) is needed. But where the first assessment is for the full par value the power of assessment is then exhausted, and there is nothing in the way of further contribution permitted by the law. Such a state of fact presents a determined and invariable limit, and the action must consequently be at law.

JOHN MASON BROWN,
For Appellant.

ALEX. P. HUMPHREY,
GEORGE M. DAVIS,
Of Counsel.

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JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

M. L. BUNDY, Receiver, etc., - - - - - - - **Appellant,**

VERSUS

WILLIAM M. COCKE, - - - - - - - - - - **Appellee.**

B. F. BUCKNER,
For Defendant in Error.

JOHN P. MORTON & CO., PRINTERS, LOUISVILLE.

Supreme Court of the United States.

M. L. Bundy, Receiver, etc., - - - - - - - *Appellant*,

VERSUS

William M. Cocke, - - - - - - - - - - - - *Appellee*.

Statement of the Case.

This appeal is from a decree of the Circuit Court of the United States for the District of Kentucky, dismissing a bill in equity brought by M. L. Bundy, Receiver of the Hot Springs National Bank, of Hot Springs, Arkansas. The bill was brought originally against William M. Cocke and Amanda M. Cocke his wife, and James Flanagan and Susan Flanagan his wife, and a demurrer having been filed by Cocke and wife on the double ground of multifariousness and want of equity, the bill was, on motion of complainant, amended by striking out the defendants Flanagan and wife without prejudice to his right to bring any future action against them.

The bill thus amended was a bill against Cocke and wife to enforce the alleged liability of Mrs. Cocke, arising under the National Banking Act, for the amount of an assessment against her as one of the registered shareholders of the bank for fifty per centum of the par value of one hundred shares of stock.

The bill, concisely stated, alleged the organization of the bank under the authority of the acts of Congress on that subject, that it suspended on the 27th of May, 1884, and had not resumed, that the Comptroller of the Currency, satisfied of the insolvency of the bank, appointed the complainant receiver thereof; that, in exercise of the powers invested in him by act of Congress, the comptroller found and determined that it was necessary to enforce the individual liability of the shareholders in said bank to the amount of fifty per centum of the par value of the stock in said association; that on the 25th of July, 1884, he made "an order and requisition on the stockholders, and each and every one of them," and directed the complainant as receiver to enforce such assessment by legal proceedings against such shareholders; that Amanda M. Cocke, the wife of William, was the owner of one hundred shares of stock standing in her name on the books of the association, and "that said Amanda is possessed of property in her own right amply sufficient to pay said assessment, but utterly refuses to do so."

The prayer of the bill in addition to the formal parts thereof was, "that an order and decree be made for the payment thereof (*i. e.* of the assessment of the comptroller) out of the separate property held by the said Amanda in their (her) own right," and for interest thereon from the 25th of July, 1884.

To the bill thus amended a demurrer was filed by Cocke and wife, but before the hearing thereof Mrs Cocke died. A bill of revivor was filed against William M. Cocke, the surviving husband, which, after a formal recitation of the steps taken on the original bill, set out that Amanda M. Cocke died in March, 1885; that she was legally empowered to make a last will and testament; that she executed and published such a will on the 6th day of November, 1884, which had been duly probated, by the terms of which she appointed her husband her executor and bequeathed all her estate to him, with directions to him to give to each of two classes of devisees named in the will one fourth of the net value thereof. The prayer was in the usual form for revivor against William M. Cocke, "as devisee and legatee of said Amanda M. Cocke, and as sole executor of her last will," and for relief against him, "out of and as to all assets by him received."

A demurrer was filed to the bill of revivor, and on final hearing the demurrers both to it and to the original bill were sustained, and, the complainant declining to amend, the bill was dismissed.

Points Relied on by Appellee.

1. The action in this case being for a specific and conclusively ascertained amount, and against a single stockholder, and having no other aim than the enforcement of the alleged personal liability of the defendant's testatrix for that determinate sum, should have been at law and not in equity.

2. The defendant's testatrix, being a married woman, was not competent to assume by contract the status of a shareholder, which must exist as a condition precedent to the personal liability sought to be enforced.

3. Even if Mrs. Cocke had the capacity to subscribe for shares of stock, and even if an action could be maintained in equity to enforce that liability, this bill is fatally defective.

Argument.

I.

I contend that this action should have been brought at law, and that a court of equity had no jurisdiction.

It is supposed that this point is decided adversely to my views by the cases of Gibson v. Kennedy, 8 Wallace, 505, and United States v. Knox, 102 United States, 423. And such was the opinion of the learned judge below. I do not understand those cases to establish this point.

Before examining them, I premise that this is an action to enforce a liability which, if it exists at all, was created by statute, and which, when liquidated by the mandate of the comptroller, became certain and definite in amount and entirely incontrovertible in that regard; that it is a several distinct personal liability, and on the facts of this case entirely unconnected with the liability of any other shareholder, and in nowise the subject of any apportionment of the burden by way of contribution between the defendant and other contributories. Whenever a pecuniary benefit is given by statute to an individual, he may sue for it in debt (Comyns Digest: Debt—A 9); or, as said by Lord Holt, in Anon. 6, Mod. 27:

> "If money be devised out of land, surely the devisee may have debt against the owner of the land for the money upon the statutes (32 Hen, 8 C. I. of Wills); for wherever a statute enacts any thing, or prohibits any thing for the advantage of any person, that person shall have remedy to recover the advantage given him, or to have satisfaction for the injury done him contrary to law by the same statute; for it would be a fine thing to make a law by which one has a right, but no remedy except in equity." (See 1 Chitty Pl., 125, and cases in notes k, l, m, Perkins' edition; Braithwaite v. Skinner, 5 M. & W. 327.)

Unless therefore some reason to the contrary exists, either as shown by statute or the adjudications on the subject, it is difficult to imagine why an action at law, instead of a bill in equity, should not have been brought to enforce the defendant's personal liability for a determinate and unchangeable sum, unconnected with the liability of any other person, and unaffected by the liability or non-liability, solvency or insolvency of other shareholders, and as to which no question either of contribution by or with others has been raised. It seems as plainly a case for an action at law as may well be imagined.

Let us examine the two cases referred to: Kennedy v. Gibson is the case of a bill in equity brought by the receiver of an insolvent national bank, in the district in which it was located, against the shareholders to enforce their personal liability. The bill averred that the receiver had ascertained that the assets and credits of the bank were insufficient to pay its debts and liabilities, and that it would be necessary to the complete administration of the trust imposed on him that recourse should be had to the personal liability imposed on the stockholders; that 2,000 shares had been issued of $100 each, and that it would be necessary to collect from them $200,000 to make good the deficiency in the means to meet the balance of the indebtedness of the bank which would remain after the application of all the available assets to the discharge of its liabilities.

The prayer of the bill was that an account be taken, and that each defendant "decreed to pay to the receiver his *pro rata* share of the indebtedness of the bank which may remain after applying to the liabilities all its effects." No assessment by the comptroller was averred.

It will be observed that this was an attempt by the receiver to bring the stockholders into a court of equity where the deficiency of assets to pay liabilities would be ascertained, and then to cause the shareholders to raise such a sum by a *pro rata* contribution as would be sufficient to meet the deficit, and it was alleged that the full amount of the whole stock of the bank would be required for that purpose.

The court said:

> "The liability of the stockholders is several not joint. The limit of their liability is the par of the stock held by each one. Where *the whole* amount is sought to be recovered the proceeding *must be at law. Where less is required the proceeding* MAY *be in equity, and in such case an interlocutory decree may be taken for* CONTRIBUTION, and *the case may stand over for the further action of the court*, if such action should subsequently prove to be necessary, until the full amount of the liability is exhausted. It would be attended with injurious consequences to forbid actions against the stockholders until the precise amount necessary to be collected shall be formally ascertained. This would greatly protract the final settlement, etc."

It is of course to be understood that these remarks of the court were intended to be applicable only to similar cases.

What is the ground of the distinction taken between actions for the recovery of *the whole amount* of the sum for which a shareholder may be made liable, and those brought to recover a smaller sum? Clearly, the ruling that actions at law *must* be brought in the first class of cases is founded on the fact that the sum to be recovered is definite and determinate, and that nothing else is to be done besides recovering the money—that no other relief is prayed—that no ascertainments of debts or liabilities is necessary, and that the interposition of the extraordinary powers of the chancellor is inappropriate. And why, in cases where less than the whole amount of the ultimate liability is claimed, "*may*" (for that is the language of the court) the action be in equity? These words must be understood, if the rule announced is founded on any distinguishable principle, to apply to cases similar in facts, and in which similar relief was sought. They evidently refer to cases in which, as in that under consideration, a settlement or winding up of the affairs of the bank by "an account" of debts and liabilities was prayed for, a *pro rata* contribution between the stockholders, to the extent of their liability if necessary, to make up the deficit, and the interposition of equitable jurisdiction to accomplish these results, unattainable in a legal forum. In other words, the rule announced is that where, as in case of a demand for the full par value of the stock, the claim is for a definite, ascertained amount, and no account of assets or liabilities is asked, and no contribution among shareholders, or other relief than the recovery of a fixed sum of money is prayed for, the whole frame of the suit, as well as the nature of the relief sought being legal, the action *must* be at law; but that, if the aid of a court of equity is necessary to take an account of assets and liabilities, or to decree contribution among stockholders, or to settle finally the accounts between the bank and its creditors, or for any other purpose beyond the powers of a court of law, or if from the existing facts it would be necessary to make further assessments in order to pay all the debts, the receiver *might* proceed in equity, *on a proper averment of facts*, to collect a partial assessment, auxiliary to the enforcement of an additional liability, measured on the one hand by the extreme limit fixed by the statute, and on the other by the unascertained deficit in the assets of the bank.

But in this case there is no proceeding against any other shareholder than Mrs. Cocke, there is no account of assets and liabilities prayed for, there is no intimation that any greater sum than fifty per cent will be required to pay the debts of the defunct association; no prayer for "an interlocutory decree for contribution, and that the case may stand over for the further action of the court " no invocation of the powers of a court of chancery, but simply an action of debt on a statute, to recover a definite sum ascertained and fixed in accordance with its terms by an officer of the United States, having sole and exclusive power to make such ascertainment. Such seems to have been the view of this court:

> "Section 5151 imposes upon the shareholders of every national banking association an individual responsibility for all its contracts, debts, and engagements; and the terms in which the obligation is created are unconditional and unqualified, except that the liability shall be equal and ratable as among the shareholders; as all the shareholders are bound in that way to all the creditors, *any proceeding to enforce this liability must be such as from its nature would enable the court to ascertain for what the stockholders ought to be made liable, to whom, and in what proportion as respects each other. This can only be done by the methods and machinery of a court of equity.* (Richmond v. Irons, 121 U. S. 48.)"

Similar views prevailed in Stanton v. Wilkerson, 8 Ben. 357, and Price v. Abbott, 17 Fed. Rep. 508.

In Bailey v. Sawyer, 4 Dillon, 463, where the suit was for seventy-five per centum of the stock, a demurrer was filed on the ground, *inter alia,* that the action should have been in equity; but, being for a determinate sum fixed by the comptroller, the court held that it was properly brought at law. I contend therefore that *this* action is not one which "*may*" be brought in equity under the rule announced in Kennedy v. Gibson, but that under the 723d section of the Revised Statutes of the United States, inasmuch as "a plain adequate and complete remedy" existed at law, that forum should have been sought.

Nor does the case of United States v. Knox, *supra*, declare any rule in conflict with the views I have presented, but on the contrary *seems* to be in accord with them. That was a mandamus to compel the comptroller, who had assessed the shareholders seventy per cent of their stock, to make an additional assessment of thirty per cent.

The opinion of the court recites the first assessment, and that a bill was filed by the receiver in the circuit court of the district where the bank was located "*against all the shareholders*"—that he had obtained a decree against all the defendants severally who were within the jurisdiction of the court for the amount due from each one according to the assessment, "and the cause was thereupon continued to await any further assessment the comptroller might deem it proper to make." Presumptively the frame of the bill must have been such as to justify "an interlocutory decree for contribution" and the order continuing the case for a further ascertainment of liability.

Nor does the fact that Mrs. Cocke was a married woman, nor the allegation of her ownership of property in her own right, nor the prayer for a decree for payment out of her separate property contribute any element sufficient to maintain the equitable jurisdiction. This will be more fully considered under another heading. At present it suffices to say, that by the original bill it was alleged that Mrs. Cocke owned "property in her own right sufficient to pay said assessment;" and in the bill of revivor it is alleged that William M. Cocke is the executor of the testatrix and sole devisee and legatee of her estate, subject to certain legacies, and the prayer is that "the said suit and proceedings therein may stand revived against the said William M. Cocke," and that complainant "have relief against the said William M. Cocke out of and as to any and all assets by him received or held as legatee or devisee of Amanda M. Cocke, or as executor of the last will of Amanda M. Cocke." It is therefore only still an action of debt against William M Cocke, in his double capacity of executor and devisee of his wife, to recover against him to the extent of assets unadministered and assets devised. This action is expressly allowed by the second section of the act of 1796 (1 Morehead & Brown's, Dig. 742), which has been substantially re-adopted in the fifth and subsequent sections of article 1 of chapter 44 of the General Statutes of Kentucky. (See Chambers v. Davis, 17 B. M. 533.)

I earnestly contend that it was never meant to be decided in Kennedy v. Gibson that the enforcement of the personal liability of a shareholder for a fixed and definite sum, ascertained by a statutory assessment unconnected with the obtention of any other relief, might be had by bill in chancery. On the contrary, as the assessment of the comptroller fixes irrevocably on each shareholder a personal liability which may be enforced in courts of exclusively legal jurisdiction, the *ratio decidendi* of that case prevents any appeal to equity on the facts presented here.

II

The next point to which I call the attention of the court is, that Mrs. Cocke, being a citizen of Kentucky, and her civil status being entirely dependent upon the laws of this State, could not, while under the disability of coverture, make a valid contract of subscription, unless authorized to do so by the act of Congress providing for the organization of national banks.

If Mrs. Cocke had not the capacity to subscribe for the stock standing in her name on the books of the bank, she did not incur the liability to assessment which resulted from being a shareholder. This clearly results from the language of section 5151 of the Revised Statutes:

> "The *shareholders* of every national bank shall be held *individually responsible* equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested therein, etc."

Unless a person sought to be charged is a "*shareholder*" in legal contemplation, the imputed liability does not exist (Ness v. Angas, 3 Exch. 803), and in this case Mrs. Cocke's liability depends wholly on her capacity to make the requisite contract of subscription.

The question of her power to contract depends on two sources of authority:

A. The law of Kentucky.

B. The act of Congress authorizing the formation of national banks.

These will be considered *seriatim*:

A.

Under the law of Kentucky the incapacity of a married woman to contract is complete, except so far as she may be authorized by statute to do so. The incapacity extends to every species of contract executed or executory, unless it be within the terms of the legislative grant of power. Owens v. Snodgrass, 6 Dana, 230; Falmouth Bridge v. Tibbatts, 16 B. M. 637; Bank of Louisville v. Gray, 8 Ky. Law Reporter, 664, are examples of the extent to which the common-law disability of coverture has been carried in this State.

Mrs. Cocke, as a resident citizen of Kentucky, derived all her contractual power from the authority conferred by the statutes of that State, so far at least as affects the liability of her property situated there, or her liability in any judicial forum executing its laws. I am not now discussing the question of a liability under the *lex loci contractus* upon obligations executed and to be performed in another State, and which by the comity between the States might be executed in any State. That question is not raised by any allegation in the bill.

On the averments of this bill the question presented is simply whether a married woman, a citizen of and domiciled in Kentucky, has authority to subscribe to the stock of a private corporation. At common law her contractual disability (with some exceptions not necessary to be referred to here) was complete, and that disability exists to-day, except so far as power is given by statute. The only power given to married women to contract is to be found in sections 19 and 20 of chapter 24, Gen. Stat., 258, and section 2, article 11, chapter 52, Gen. Stat., 519:

> "19. Married women may convey any real or personal estate which they own, or in which they have an interest, legal or equitable, in possession, reversion, or remainder."
>
> "20. The conveyance may be by the joint deed of husband and wife, or by separate instrument; but in the latter case the husband must first convey or have theretofore conveyed. Section 21 of the same chapter provides that the deed of a married woman, 'to be effectual,' must be acknowledged and recorded in the mode therein provided."

Section 2, article 11, chapter 52, Gen. Stat., 519, provides as follows:

> "Such real estate or rent shall not be liable for any debt or responsibility of his (the husband) contracted before or after marriage, but shall be liable for her debts and responsibilities incurred before marriage, and for such contracted after marriage, the account of necessaries for herself or any member of her family, her husband included, as shall be evidenced by writing signed by her."

As to stock in bank or other corporations, section 15, article 4, chapter 52, Gen. Stat., 523, provides:

> "If any stock in any of the banks or other corporations of this State is taken for or transferred to any female, and it is expressed on the face of the certificate or transfer book of such stock that it is for the use of such female, no husband of hers shall take any interest in such stock or the dividends thereon; at her death it shall pass to her heirs; but if unmarried she may dispose of it, with the consent of her husband, or without such consent if so provided in the deed or will creating the trust. She may receive the dividends and give acquittances therefor though married, but she shall not in any way anticipate the same, nor shall any dividend be paid upon any order or power given by her before the same is declared."

Section 16 of the same chapter authorizes married women and minors to make deposits and draw checks against the same.

There is no provision of the statute law of Kentucky which authorizes a married woman to obtain by contract shares in any private corporation. Her rights in that respect are governed by the common law. She can neither subscribe for them nor make a contract for their purchase from an original subscriber. As to stock in domestic corporations the statute above quoted defines the limit of her rights.

There can, it seems to me, on principle be no clearer proposition, that a married woman can not by the rules of the common law become a member of a private corporation.

Pugh and Sharman's Case, L. R., 13 Eq. 566, may be considered on this point. In that case it appeared that Sharman in the year 1866, being the owner of a large number of shares in the Hercules Insurance Company, applied for four hundred additional shares, and the directors refusing to allot him any more, caused his daughter, Mary Pugh, a married woman, to apply for the shares desired. The company was wound up, and the official liquidator applied to have Sharman's name placed on the list of contributories, and Mrs. Pugh applied to have her name removed therefrom. Malins, V. C., said:

> "There is no doubt that if Mr. Sharman had taken the shares in the name of a trustee he would have been liable to pay indirectly, though not directly, to the company. He, however, choses to use the name of his daughter, who was as incapable of contracting as if she had been an infant, and who it is perfectly clear, could not have taken the shares. . . I must attribute to Mr. Sharman the knowledge that his daughter, being a married woman, was incapable of contracting. . . . It is perfectly clear, that if Mr. Sharman's name had been on the register, and he had made a transfer into the name of his married daughter, such a transfer would have been wholly inoperative, and he would have remained a contributory notwithstanding the transfer. In my opinion there can be no difference between a fraudulent attempt to get rid of liability by a transfer of shares, and a fraudulent

attempt to obtain shares by taking them in a false or fictitious name. . . . I think, on general principles, that Mr. Sharman, by applying for shares in the fictitious name of his daughter, is as liable to take the shares as if he had taken them in his own name. I call Mrs. Pugh's name fictitious, because Mr. Sharman knew perfectly well that she could not bind herself. If he had applied in the name of a person capable of contracting, the case would be different."

And in Phillips v. Covington Bridge, 2 Met. Ky. 225, which was an action on a subscription payable when $400,000, including that sued on, had been subscribed, the court said ;

"The jury were instructed by the court to exclude from their computation the stock of persons who were insolvent, or were infants, or *married women*, when the subscriptions were made, unless such subscriptions had been paid. The instructions to the jury, which were given by the court below, were correct."

It will hardly be contended, I presume, that under the common law as administered in Kentucky, or that under any statute of that State, Mrs. Cocke had any power to contract by way of subscription for the shares in question, or for their purchase from some other person.

But it is contended that she had power to bind her separate estate by contracts made with reference to it, and that therefore she had power to subscribe for or purchase the shares standing in her name.

It will appear from the record that the particular contract made by Mrs. Cocke is not set out; that it does not appear whether she subscribed for the shares, bought them from a previous owner, or received them as a gift. The only allegation in that regard is, that at the failure of the bank Mrs. Cocke was the owner of one hundred shares of its capital stock. There is no averment that she made any contract of subscription or purchase with the intent to bind her separate estate; no separate estate of which she was the owner is described or in any way identified, and no facts whatever are alleged tending to show that she made any contract, or did any act showing an intention to contract with reference to or to bind her separate estate. The only averment as to her property is (as shown in the statement of the case) that the said "Amanda is possessed of property in her own right, amply sufficient to pay said assessment," and this is accompanied by a prayer for payment of the assessment out of her "separate property."

Upon these bald and naked averments it is attempted to be maintained that the court below should have held that Mrs. Cocke was personally liable, and that she contracted with reference to her separate estate, and charged it in equity, not only with the payment of any sum which she may have contracted to pay for the stock, but to the extent of her liability under the act of Congress.

The argument seems to be that a married woman having separate estate may charge it, and that as she might charge it, the contract of subscription in question, in order that it may be regarded as a valid one, must be taken and considered as a contract charging such separate estate, and that although the contract considered alone as her obligation is void, yet when it is considered as a charge on her separate estate is valid not only *quo ad hoc*, but as a contract binding her personally for the debts of the corporation within the limits prescribed by the act of Congress.

This seems to me to be arguing in a vicious circle. If Mrs. Cocke had not the legal right to become a shareholder, then her attempt to do so must be regarded as futile, and her invalid attempt to subscribe can not be galvanized into life by calling it a charge on her separate estate. The primary question is, and it can not be evaded, did she have the power to make a valid subscription? If she did not, the effect of this disability can not be avoided by saying that the subscription must be regarded as a valid charge on her separate estate, and that, as it was a charge on her separate estate, it must have been a valid subscription. Indeed the whole argument is, that this is a good charge on Mrs. Cocke's separate estate because it was a valid subscription; and that it was a valid subscription because it was a good charge.

The learned counsel rely on Mrs. Matthewman's case, L. R. 3d Equity, 781. That is the only case in England before the passage of the Married Womens' Acts of 1870 and 1882 (to be referred to hereafter), in which the estate of a married woman was held liable for shares subscribed for by her while laboring under the disability of coverture. Against the authority of that case several of contrary principle may be cited. The case already cited *supra* (*Pugh v. Sharman case*) is directly in conflict with it, and Luard's case, 1 De Gex, Fisher & Jones, 533 (as to which the learned counsel on the other side have fallen into the error of supposing that Sir Hugh Cairns was counsel for the married woman, and seeking her release on the ground of coverture), was decided on principles antagonistic to those of Mr. Matthewman's case.

A Mr. Bigge was the owner of eight hundred and five shares of bank stock at the time of his death. His widow became his administratrix, sold four hundred and forty of the shares, and caused the remaining three hundred and sixty-five to be transferred to her name. She then married Mr. Luard, having first settled her stock and other property to her separate use for life, remainder to her children by the first marriage; but the trustees named declined to serve. On the failure of the bank Vice-Chancellor Kindersley ordered that the name of Mr. Luard should be excluded from the list of contributories, and that the name of Mrs. Luard should be placed thereon *in respect of her separate estate.* From this order the official liquidator appealed, as his counsel, Sir Hugh Cairns, contended in a masterly argument that, on the marriage of the owner of the shares, her husband became liable in her stead.

He said:

> "When a female shareholder marries, her husband may require his name to be inserted as shareholder instead of that of his wife; the company then would have nothing more to do with the wife's title. If there is an agreement between

the husband and wife which takes away the husband's right to make himself owner of the shares, the shares may be transferred into the names of trustees, and then the husband escapes all liability in respect of them. The trustees are the persons liable, and have a remedy over against the wife's separate property; if that is not sufficient to indemnify them they must bear the loss. If trustees can not be found, and the husband does not choose to run any of the risks of a shareholder, he must induce the wife to part with the shares before the marriage. But if none of these steps are taken, the wife's name remains on the list of shareholders, and the husband, during the coverture, is by law fixed with the same liability as she was while single, and it is wholly immaterial what contract there may have been between the husband and wife."

And after criticising the decision of the vice-chancellor, as in effect placing married women who owned shares at their marriage in the singularly advantageous position of allowing them and their husbands to enjoy the benefit of the shares without any liability, he proceeds:

"She therefore ought to be put on the list of contributories, and she can only be put on along with him. The entry ought to stand as it was before the order appealed against, Robert Luard and Lewis Marianne, his wife, in right of the wife."

And Lord Justice Turner, after a very careful examination of the question, thus announced his conclusion:

"In my opinion, therefore, this statute has not altered the law as to the liabilities of husbands, and as, Mrs. Luard having been upon the register, the calls would properly be made upon her, I think Mr. Luard, her husband, must be liable in respect of those calls. I think, therefore, that the words "*in respect of her separate estate,*" ought to be taken out of the order, and that both Mr. and Mrs. Luard ought to be placed upon the list of contributories, he being placed upon it in right of his wife."

It appears therefore, from this case, that Mrs. Luard owned these shares at the time of her second marriage, and that by an ante-nuptial contract they were settled to her sep-

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the husband and wife which takes away the husband's right to make himself owner of the shares, the shares may be transferred into the names of trustees, and then the husband escapes all liability in respect of them. The trustees are the persons liable, and have a remedy over against the wife's separate property; if that is not sufficient to indemnify them they must bear the loss. If trustees can not be found, and the husband does not choose to run any of the risks of a shareholder, he must induce the wife to part with the shares before the marriage. But if none of these steps are taken, the wife's name remains on the list of shareholders, and the husband, during the coverture, is by law fixed with the same liability as she was while single, and it is wholly immaterial what contract there may have been between the husband and wife."

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It appears therefore, from this case, that Mrs. Luard owned these shares at the time of her second marriage, and that by an ante-nuptial contract they were settled to her separate use, but that *as no statute had altered the common law* in that regard, and as the trustees of her settlement declined to act, the shares remained in her name, and that the common-law liability of the husband attached at the marriage and continued during the coverture. That she dealt with these shares as "*separate estate*," and received dividends during her second marriage up to the failure of the bank, in nowise changed or altered the common-law rule which made the husband bound for the debts and liabilities of the wife. Certainly, if the fact that a married woman has a separate estate, and performs all the acts necessary to evidence the fact that she was a holder of shares in her own right and free from the control of her husband, could in anywise create a *status* as to those shares different from that created by the common law, Luard's case is a much stronger one for the separate liability of the wife than the one at bar. The argument was that these acts made the shares separate estate, and that the husband was not liable. But the decision was that the common law bound the husband from the time of his marriage for all the liabilities of the wife. From this the corollary is plainly to be deduced, that no contract of the wife during coverture, unauthorized by statute, is valid, or can create any liability of her separate estate, or establish for her a status different from that which the common law creates with relation to her tenure of shares in a corporation.

And it was held in Aylett v. Ashton, 1 Mylne & Craig, 105, that the fact that a married woman owned separate estate gave her no authority to make any contract binding her *personally*. Sir C. Pepys, M. R., said:

> "A *feme covert* is not competent to enter into contracts so as to give a personal remedy against her; although she may become entitled to property for her separate use, she is no more capable of contracting than before; a personal contract would be within the incapacity under which a *feme covert* labors. Sir T. Plumer says, in Francis v. Wigzell, 1 Madd. 258, 'There is no case in which this court has made a personal decree against a *feme covert*. She may pledge her

See John Murgatroyd Case Eu Arb 605
& Ousley's Case " " 137
Scarisbrick's Case " " 105

separate property and make it answerable for her engagements, but where her trustees are not made parties to a bill and no particular fund is sought to be charged, but only a personal decree against her, the bill can not be sustained.' Sir T. Plumer then refers to Hulme v. Tenant, 1 Brown's C. C. 16, before Lord Thurlow, and to Naates v. Corrock, 9 Ves. 182, where Lord Eldon lays down the rule in precisely the same terms. The present bill does not seek to affect the separate property except through Mrs. Ashton personally. If it had sought to affect the property upon the ground that the contract had given the plaintiff a right against the property, the suit would have been brought against the trustees; for there must be some trustees of that part of the property which is settled to Mrs. Ashton's separate use although their names do not appear."

These principles seem to me to be fundamental in the law of husband and wife, and to have been wholly overlooked in Mrs. Matthewman's case. If Mrs. Cocke had power, because she owned separate estate, to subscribe for stock in a private corporation, there is not any kind of conceivable contract which she might not make—there is no limit whatever to her contractual power. I therefore repeat that the argument on the other side *must* be unsound. Because a married woman owns separate estate and has the power to bind it, adds not a whit to her contractual power and in no sense breaks the shackles of coverture. (See Hahn & Bros. Appeal, 15 Amer. and Eng. Corp. Cases, 537.) The premise of the argument, *i. e.* that she owns separate estate, does not sustain the deduction, for *non constat* that she may enter into a contract imposing on her a personal liability. And this particular contract which it is supposed Mrs. Cocke entered into not only imposed, if it was valid, a personal liability to pay the calls on the stock as made by the bank, but a contingent and future liability to its creditors. The whole undertaking on her part was the assumption by executory contract of personal liabilities to the bank and its creditors; and if the ownership of separate estate qualified her to enter into these engagements, it is difficult to conceive what, if any, contracts she might not make. The argument, that because she had separate property she was thereby so far emancipated from the disabilities of coverture as to be able to subscribe for stock in a corporation, seems entirely without any support in principle, and is contradicted by overwhelming authority. In the Kentucky case of Sweeney v. Smith, 15 B. M. 326, Marshall, Chief Justice, said:

"If the judgment in this case had been against the land instead of the person of Mrs Sweeney, it would not have been reversible. But the deed referred to in the pleadings of the plaintiff and exhibited in evidence conveys to her a separate estate in the land therein mentioned. And although she may render that estate liable for her engagements she can not bind herself personally." (See also Bell v. Kellar, 13 B. M. 383.)

And in Peachey on Marriage Settlements, Sec. 273, it is said:

If she (the wife) should survive her husband, although the creditors may still have the right in equity to enforce the payment of the debts contracted during coverture out of any remaining estate of interest which was settled to her separate use, yet her person and her general property remain as completely exempt as before from all liability, and she would not be sued for them at law, notwithstanding her having become discovert."

And in 1 Bishop's Married Women, Sec. 842, it is said:

"We have seen that, unless a wife is acting under what the law deems coercion from her husband, she can bind herself by her civil torts the same as though she was discovert. On the other hand, she has no such general power in respect of contract, though, as we have also seen, that branch of the law which is administered in the equity tribunals gives her a good deal of liberty in this respect. But it should be observed that this liberty pertains merely to the *thing* contracted about, and does not extend to *her person*. Thus, if a wife commits a civil tort, though, when she is sued during the coverture, her husband must be joined with her as defendant; yet, on his death, the judgment abides as a debt running alike against her and her property; or, if judgment has not been rendered, she may be proceeded against alone. But, if a wife enters into a contract however valid as respects her property, she can not be sued upon it at law either during or after the coverture, and it does not in any way, at law or in equity, bind her person. In other words, though a wife may by contract bind her property, she can not bind her person."

The question of the liability of a married woman because of her ownership of shares in a bank arose in the House of Lords in (Bell's Case, L. R. 4, Appeal Cases, 547), and while the decision was not express, enough appears to show that the law was regarded as correctly laid down in *Luard's* case, and that a married woman had no capacity to subscribe for shares. Janet Lang, with other persons, held in trust certain shares in the Glasgow Bank. The shares were registered in her name and in the names of her co-trustees. She was an infant when she first accepted the trust, and married Robert Hill after acceptance. She continued to act as trustee, and received dividends until the failure of the bank. On the question of her liability Lord Cairns said:

> "With regard to Janet Lang, it is to be observed that she was not of age at the meetings of the trustees in 1865 and 1867, and she can not therefore be held bound by what passed at those meetings. She was of age at the time of the meeting of the 26th of September, 1872, but she was then married to her present husband, Robert Hill, and he is no party to this appeal, and was not a party in the Court of Sessions. It is possible that, besides the minute of the 26th of September, 1872, the previous minute stated the 27th of June, 1871, made after she came of age and before her marriage, may have to be considered with regard to her liability; but if she is to be placed upon the list of contributories, her husband's name ought, under 78th section of the Companies' Acts, 1862, to be placed along with hers, and the question of her liability should be decided in his presence. I propose, therefore, to move that, except as to the appellant Janet Hill, the appeal should be dismissed; and that as to Janet Hill it should be declared that her name should *in hoc statu* be removed from the list of contributories without prejudice to the right of the official liquidators to place upon the list the names of her husband and herself in her right."

And the legislature of England recognized this to be the state of the law, as clearly appears from the provisions of the Married Women's Property Act of 1870.

By section 1 of that act, the wages and earnings of a married woman were made separate estate, and section 2 makes the same provisions as to her annuities and deposits in saving banks. Section 3 requires the banks of England and Ireland to transfer to her separate use all public stocks and funds to which she "is entitled, or which she is about to acquire." Section 4 contains *inter alia* these provisions:

> "Any married woman, or any woman about to be married, may apply in writing to the directors or managers of any incorporated or joint stock company, that any full paid up shares, or any debenture, or debenture stock, or any stock of such company, *to the holding of which no liability is attached*, and to which the woman so applying is entitled, may be registered in the book of said company in the name, or intended name of the woman, as a married woman entitled to her separate use; and it shall be the duty of such directors or managers to register such shares or stock accordingly, and the same upon being so registered shall be deemed to be the separate property of said woman, and shall be transferred, and the dividends and profits paid as if she were an unmarried woman."

Other sections place the same safeguards around her property coming to her as distributee or next of kin, and secure to her separate use the rents of her real estate and proceeds of her policies of insurance. The twelfth section relieves the husband in all marriages occurring after the act from liability for her debts contracted before marriage, and substitutes therefor liability of her separate estate. (L. R. Statutes, 1870, p. 570.)

It will be readily perceived that by this act it was intended to change the common law so as to allow married women to own as separate estate various kinds of property previously within the power of the husband, and subject to his disposition; but that its enabling provisions were not intended to allow her to become a member of any corporation involving any *personal or individual liability*. In other words, the changes made in the common law were so framed as to prevent her from involving her husband in liability as a member of a corporation, and did not allow her to involve her separate estate in that way. Its passage clearly shows that the right to become a member of a private corporation did not exist, and that it was deemed inexpedient to invest her with this power, only to the extent of allowing her to join companies in which no individual liability could be incurred.

The law remained in this condition in England until the passage of the Married Women's Property Act of 1882, in which very great changes were made in the existing law. Married women were expressly allowed, by section 7 of this act, to become shareholders in any company whatever, but they were not personally liable by reason thereof, but only their separate estates—the provision being that "so far as liability may be incident thereto, her separate estate shall alone be liable."

An act of Parliament was deemed necessary in England, as an act of the legislature was in Kentucky, to enable married women to subscribe for bank stock, or to acquire it by purchase during coverture.

The case of Reg v. Carnatic R. R. Co., L. R., 82, p. 299, cited on the other side, so far as it is an authority, is against the complainant in error.

That was the case of the transfer of shares in a company, with no liability, made by the husband to the wife after the adoption of the Married Women's Property Act of 1870. Subsequently the wife contracted to sell the stock, and the company refused to register the stock in the name of the purchaser without the husband's consent.

Lord Blackburn said:

> "But for the late act the company would have had the right to refuse to register a transfer of stock by the wife, without the husband's concurrence. But it is clear that this act imposes on the company a burden which no act has before cast upon them, of registering stock in the name of a married woman," etc.

It is clear that if the wife had the power before the act of 1870, either by statute or general law, to become a corporator in a joint stock company, the decision would have been different, for if she had power to subscribe the company was bound to register her on the payment of the price of the shares.

Butler v. Cumpstow, L. R. 7, Eq. 16, cited by the learned counsel, only decides that when a trustee for a married woman entitled to a separate use has been held liable in respect of shares registered in their name, which shares were subscribed for by them at her request, on a promise to pay for them out of her separate estate, the married woman's savings from her separate estate must go to indemnify the trustees for their loss.

All that is said in the opinion as to the *feme covert's* power to take shares is *dictum,* and in conflict with Luard's case and Bell's case, *supra*, but the *decision* is maintainable on the clearest principles of equity. The trustees were in duty bound to make investments, and if loss attached without fault or negligence on their part, the trust estate was bound for their indemnity. This was admitted by Sir Hugh Cairns in his argument in Luard's case.

But the learned counsel also rely on the case of the Reciprocity Bank, 22 N. Y. 10, as sustaining the proposition, that as Mrs. Cocke owned separate estate she had the power, notwithstanding her coverture, to subscribe for stock in a bank. A careful examination of that case will, I think, conclusively show its inapplicability to this one.

In that case there were two married women sought to be made contributories, Mrs. Lansing and Mrs. Dann. Mrs. Lansing owned the stock in question before her marriage; after her marriage the stock remained in her name and she received the dividends. The court say:

"The rule of the common law was that choses in action including shares of stock, by reason of their resemblance to that description of property owned by a woman at the time of her marriage, continued to be her property after marriage until reduced to possession by her husband." "The statute of 1848, for the protection of the rights of married women, did not and could not constitutionally take from the husband this right of reducing to possession where the right became vested by marriage prior to the passage of the act. But Mr. Lansing never exercised the right in respect to the shares in question. They remained therefore her property after marriage as before. She continued to be a stockholder, and as such was liable to assessment *by the terms of the statute under which these proceedings were had.*"

The Act of 1848 referred to is in these words:

> "SECTION 1. The real and personal property of any female who may hereafter marry, and which she shall own at the time of marriage, and the rents, issues, and profits thereof shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property, as if she were a single female.
>
> "SEC. 2. The real and personal property, and the rents, issues, and profits thereof of any female now married shall not be subject to the disposal of her husband, but shall be her sole and separate property as if she were a single female, except so far as the same may be liable for the debts of her husband heretofore contracted.
>
> "SEC. 3. Any married female may take by inheritance, or by gift, grant, devise, or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise real and personal property and any interest or estate therein, and the rents, issues, and profits thereof, in the same manner and with like effect as if she were unmarried, and the same shall not be subject to the disposal of her husband nor be liable for his debts." (4 Edmunds' N. Y. Stat. at Large, 513.)

This statute gave to all married women the unlimited and unqualified right to acquire just as a *feme sole* any real or personal property. Mrs. Lansing acquired the property while a *feme sole.*

Now, how was it that she became liable to contribute in respect of these shares? The second section of an act to enforce the responsibility of stockholders in certain banks, passed April 5, 1849, is in these words:

> "SEC 2. The term 'stockholder,' as used in this act, shall apply not only to such persons as appear by the books of the corporation or association to be such, but also to every equitable owner of stock, although the same may appear on such books in the name of another person; and also to every person who shall have advanced the installments or purchase money of any stock in the name of any person under twenty-one years of age, and while such person remains a minor, to the extent of such advance; and also to every guardian or other trustee who shall voluntarily invest any trust funds in such stock; and no trust funds in the hands of such guardian or trustee shall be in any way liable under the provisions of this act, by reason of any such investment, nor shall the person for whose benefit any such investment may be made, be responsible in respect to such stock, until thirty days after the time when such persons respectively become competent and able to control and dispose of the same, but the guardian or other trustee making such investment as aforesaid shall continue responsible as a stockholder until such responsibility devolves upon the person beneficially interested therein; and in respect to stock held by a guardian or other trustee, under a transfer of the same by a third person, or under positive directions by a third person for such investment, the person making such transfer or giving such direction, and his executors and administrators, shall, for the purposes of this act, be deemed a stockholder, and the estate of such person, if he be deceased, shall be responsible for the debts and liabilities chargeable on such stock according to the provisions of this act." (4 Edmunds' N. Y. Stat. at Large, 154.)

Now, the ground on which Mrs. Lansing was held responsible, as stated in the extract quoted above is, that she was "*a stockholder*, and *as such was liable to assessment*." This will appear very clear when the first section of the act is considered in conjunction with the second, quoted *supra*. The first section provided that whenever any default in the payment of any liability created after January 1, 1850, was made by any banking corporation, "the stockholders of such corporation or association shall be individually responsible for the amount of such debt or liability," etc. In this case, therefore, we have a capacity granted by statute to married women to acquire any kind of property, real or personal, and hold and enjoy it free from the control of their husbands; and annexed to this capacity to take during coverture was a liability resulting from ownership of bank stock. It was as under the act of Congress an individual liability, and not a mere liability of the married woman's separate property, as in Mrs. Matthewman's case. This is clear, from that part of the opinion in which the court say:

> "It is also said *femes covert* are not liable to suit or judgment at the common law, and in general this is true. It is also true that the apportionment of liability among stockholders in banks, when duly confirmed, becomes a judgment against each stockholder to be enforced by execution as in other cases. But it was competent for the legislature to depart from the rules and analogies of the common law and to make married women and their estates liable in this proceeding as other shareholders in banks are made liable. This we think has been done, and we see no reason why it ought not to be done in order to effectuate the policy in which the constitutional provision and the statute are founded. It might go far to defeat that policy if married women could *take and hold* stock without liability to the creditors."

Mrs. Dann's case varied a little from Mrs. Lansing's in the facts. She owned separate estate which she derived from her father, which was held for her use by trustees. By an act passed April 11, 1849, it was provided that:

> "SEC. 2. Any person who may hold, or who may hereafter hold as trustee, for any married woman any real or personal estate or other property, under any deed of conveyance or otherwise, on the written request of such married woman, accompanied by a certificate of a justice of the Supreme Court that he has examined the condition and situation of the property, and made due inquiry into the capacity of such married woman to manage and control the same, may convey to such married woman, by deed or otherwise, all or any portion of such property, or the rents, issues, or profits thereof, for her sole and separate use and benefit." (4th Edmunds' Statutes at Large, 514.)

Under the authority of this act the trustees conveyed the property to Mrs. Dann, a part of the assets conveyed was invested in the bank shares in question in Mrs. Dann's name, and remained so until a few days before the failure of the bank, when she endeavored to transfer them to her husband. On this state of case (the statute prohibiting colorable transfers) it was held that she remained a stockholder, and under the statutes above referred to was liable.

It may also be noted as evidence of a legislative interpretation of the act of 1848, that the New York Legislature on the 3d of June, 1851, passed an act allowing "any married woman, being a stockholder or member of any bank," etc., to vote in person or by proxy at all corporate elections. (3 Edmunds' Statutes at Large, 682.)

In both these cases the ownership of stock was the test of liability, and the court held, that under the act of 1848 married women were invested with the power to acquire every species of property, and to hold and enjoy it as if discovert.

I claim, therefore, that the ownership of separate estate and the power to charge it does not free a married woman from the disabilities of coverture, nor increase her general contractual powers. The question however is not as to the law of England or New York, but as to the Kentucky law on that subject, and I desire to call the attention of the court to the question which lies at the foundation of Mrs. Cocke's liability. Is the emancipation of a married woman from the disabilities of her condition absolute or limited as to the property secured to her separate use? In other words, is she considered with reference to that property absolutely as an unmarried woman?

Before the adoption of the Revised Statutes in 1851, a married woman could by the execution of any instrument of writing, when such was her intention, create a charge on any property held for her separate use, unless power in that regard was denied her by the terms of the trust. (Coleman v. Woolley, 10 B. M. 322; Bell v. Kellar, 13 B. M. 383.)

A radical change was however made by the adoption of the Revised Statutes. Section 17, article 1, chapter 47, is in these words:

> "If real or personal estate be hereafter conveyed or devised for the separate use of a married woman, or for that of an unmarried woman, to the exclusion of any husband she may thereafter have, she shall not alienate such estate with or without the consent of any husband she may have; but may do so when it is a gift, by the consent of the donor or his personal representative."
>
> Such estates, heretofore created, shall not be sold or encumbered but by order of a court of equity, and only for the purpose of exchange and reinvestment, for the same use as that of the original conveyance or devise; and the court shall see that the exchange or reinvestment is properly made." (2 Stanton's Revised Statutes, 28.)

The Revised Statutes also contained a provision authorizing a married woman in certain case to act as if discovert. It is in these words:

> "When the husband abandons the wife and lives separately and apart from her, or abandons her and leaves the State without making sufficient provision for her maintenance, or where he is confined in the penitentiary for an unexpired term of more than one year, the wife may, by petition in chancery, be empowered to use, enjoy, and sell for her own benefit, any property she may acquire thereafter, or may have acquired since the abandonment or leaving the State; to make contracts, sue and be sued as a single woman, and also to recover in her own name any property or debt to which she is entitled, or to which the husband is entitled in her right. She may also be empowered to sell and convey by her own deed any of her real estate or slaves, freed from any claim of her husband." (2 Stanton Revised Statutes, 12.)

Under the 17th section, *supra*, the wife's power to alien, charge or incumber her separate estate was absolutely destroyed, except in the cases mentioned in the act. (Daniel v. Robinson, 18 B. M. 306; Stuart v. Wilder, 17 B. M. No. 55; Gatewood v. Bryan, 7 Bush, 511.) And her inability to alien, incumber or in any way deal with her separate estate was denied, although the terms of the trust conferred on her unlimited powers of alienation. (Stuart v. Wilder, *supra.*)

The Revised Statutes were amended, in 1856, so as to authorize the execution by married women of powers of exchange and reinvestment conferred by conveyances made before the passage of the act; and, in 1858, as to all separate estates so as to permit alienation by a trustee under an express power in the instrument creating the trust. (2 Stanton's Revised Statutes, 32.)

And in 1866 another amendment allowed married women to alienate their separate estate, whether the trust was created before or after the adoption of the Revised Statutes, with the consent of the husband and in pursuance of an express power. (Myers' Supplement, 728.)

The legislature also passed, in 1866, an act authorizing married women to act as *femes sole* in certain cases therein specified. The first section of the act is as follows.

> On the joint petition of husband and wife, or on the petition of the wife, the husband being made a party thereto, filed in the circuit court in the county of her residence, and on satisisfactory evidence, the court may empower the wife to use, enjoy, sell and convey, for her own benefit, any property she may own or acquire, free from the claim or debts of her husband; or to make contracts, sue or be sued as a single woman, or to trade in her own name, or dispose of her property by will or deed; either one or all of the powers herein enumerated may be granted, but in all cases the wife's property shall be liable for her debts, contracts, and liabilities; and before rendering such judgment, the court shall be satisfied that the application is not made either by husband or wife with the intent to cheat, hinder, or delay the creditors of the husband, and that his creditors will not be injured." (General Statutes, 521.)

It will be seen that, under the legislative policy inaugurated in 1851, married women owning separate estates were not, unless authorized by a decree of court, permitted to contract, or carry on any separate trade or business, or in any way to bind their separate estates. As to their *general* estate, an express provision authorized them to bind it by a note signed by the husband and wife. (When the General Statutes were adopted, in 1873, the concurrence of the husband was dispensed with.)

The law remained in this condition until the act of 1868 was passed. That act is as follows:

> "That where real property has been or shall hereafter be conveyed or devised to a married woman for her separate use, without the intervention of a trustee, and without any restriction upon the sale or conveyance thereof during coverture, the right of such married woman to sell and convey the said property shall be the same as if the said property had been conveyed or devised to her absolutely, without any separate use being expressed; but her separate use shall continue in the proceeds of such sale. (Sess. Acts, 1867–8, p. 5.)

The General Statutes re-enacted this act in a modified form:

> "Separate estates and trust estates, conveyed or devised to married women, may be sold and conveyed in the same manner as if such estates had been conveyed or devised absolutely, if there be nothing in the deed or will under which they are held forbidding the same, and if the trustee and husband unite with the wife in the conveyance. But her interest shall be the same in the proceeds as it was in the estate." (General Statutes, 532.)

It will therefore be apparent that from 1851 to 1868 married women were forbidden to alienate, charge, or encumber their separate estates; that from 1851 to 1866 they were powerless to make contracts with reference to their separate estates, or to carry on a trade or business; and that from 1866 to the present time (the act of 1866 having been re-enacted in the General Statutes of 1873) they are authorized to do so when empowered by a court of equity. It will also appear that, independently of the act of 1886, they have by the act 1868, in its modified form embodied in the General Statutes, the same power of alienation (where the terms of the trust do not forbid) that they have of their general estates, and that by section 17 of article iv, chapter 52, General Statutes, *supra*, this power can only be exercised with the concurrence of the husband, and by sections 19 and 20 of chapter 24, General Statutes, *supra*, can only be done by deed. There is, therefore, in these acts authority for alienation and incumbrance by married woman of their separate estates, *in the mode pointed out in the statutes,* and they had no other right. By the well-settled law of Kentucky the ownership of separate estate did not enlarge the general contractual power of a married woman (Burch v. Breckinridge, 16 B. Mon. 486), and she could never render herself personally liable by contract; as the statutes give her a right of alienation, to be excised in a particular way, every other mode is necessarily excluded, and especially is this so as her husband's concurrence in the act of alienation is required. To permit the wife, therefore, to charge her property by contracts made by her during coverture, is directly in the teeth of the statute, and her power to make contracts and transact business as a *feme sole* exists only when so authorized by decree (Urig v. Horstmann, 8 Bush, 1872, Penn v. Young, 10 Bush, 628), and that no power to charge or alienate, except that conferred, is clearly inferable from Hershman v. Brashears, 79 Ky. 259, for the instrument executed by the wife would have been a valid charge or incumbrance but for the statute (Bell v. Kellar, 13 B. Mon. 381; and Jarman v. Wilkerson, 7 B. Mon. 293), and if by the decree she is only authorized to sue and be sued, and to dispose of her property by will or otherwise, the power to *contract* liabilities is not included. (Bidwell v. Robinson, 79 Ky. 33.)

The statute gives the wife the right to alienate her separate estate "*in the same manner*" that she may alienate her general estate. That can only be done by deed or by note given for necessaries. (Grieshaber v. Hariman, 2 Bush, 321; Hannon v. Madden, 10 Bush, 666.) Any attempt, therefore, to charge the wife's separate estate except by deed in which the husband joins, unless for necessaries, is wholly ineffectual.

I would be disingenuous if I did not call attention of the court to the case of Baird v. Brunning, 4 Ky. Law Reporter, 206, in which it was held that a note signed by husband and wife imposed a charge on the wife's separate estate. The opinion is a manuscript one, and the case has never been ordered to be published. It bears evidence of hasty consideration and inaccurate conclusions. Among the transparent errors manifest upon its face is that it is said therein that the act of 1846, for the protection of married women, is the foundation of a wife's authority to charge her separate estate. That the act referred to *did not* create separate estates was expressly decided in Smith v. Long, 1 Met. 486, and that the doctrine in Kentucky as to charging separate estates is a component part of the system of equity obtained by adoption from England is expressly held in Jarman v. Wilkerson, 7 B. M. 293. It seems remarkable, to say the least, that a married woman may, by the execution of a note or other informal writing, create a valid lien on her property without the concurrence of her husband and against his will, while a mortgage or other formal instrument of conveyance is void unless he joins in it and unless the wife acknowledges it on a privy examination.

The Court of Appeals, however, in a recent case (December, 1886) marked for publication, have had the effect of these statutes called to their attention, and they have conclusively, I think, laid down the principles in accordance with my contention.

Thirty-five shares of the stock of the Bank of Louisville stood on the books of the bank in the name of "George E. H. Gray, trustee for Lucy A. Gray." This stock was the separate estate of Mrs. Gray, the wife of the trustee.

Gray and wife executed and delivered to Hays a power of attorney authorizing him to sell and convey the stock. Hays caused the stock to be transferred to his name on the books of the bank and ultimately sold it to the bank. Mrs. Gray sued the bank for the stock and accrued dividends, principally on the ground that the power of attorney was void.

The court said:

"There is no statute in this State giving a resident married woman the right to execute a power of attorney. In it she would not convey or acknowledge a conveyance or be privily examined. *She is only authorized by the statute to convey upon privy examination;* **AND THE GRANT OF POWER IN THIS MODE MUST BE HELD TO EXCLUDE ANY OTHER.** Our statute expressly provides that a non-resident married woman may convey any real or personal estate which she may own in Kentucky by an agent under a proper power of attorney; and this implies that the resident can not do it.

"We are not to judge whether the absence of this power is the result of wisdom or not. We must construe the statute as we find it. Nor can we, in the Turkish manner, decide according to the hardship of the case, whether it be one way or the other. Hard cases make shipwreck of the law.

"It is proper, however, to say that the object in creating separate estate was not to enable the wife to dispose of her property, but to protect her against the dominion of her husband and enable her to keep it; and a proper policy perhaps dictates that *the power to convey, which has been expressly given to her upon certain conditions, should not be delegated by her to others.* We conclude that the so-called power of attorney was, as to Mrs. Gray, void." (Bank of Louisville v. Gray, 8 Ky. Law Reporter, 667.)

This decision, made after full argument, and reversing the Superior Court and affirming the court below, establishes the doctrine that in Kentucky a married woman in respect to her separate estate is considered as a *feme sole* only *sub modo*—that she is still under the bonds of coverture, and that she may contract only to the extent and in the manner prescribed by statute. It is clear that if married women in Kentucky had been, as to their separate estates, considered as freed from the disabilities of coverture, the power of attorney in question would have been a valid act, in the double aspect of the appointment of an agent by a person *sui juris quo ad hoc*, and as an act done in the course of some transaction of dealing with her separate estate by a person competent to control, manage, and dispose thereof. The statement by the court that the statute must be looked to for the authority of married women to contract or bind their separate estates is conclusive against the complainant in error.

And this decision is in exact accord with the principle of

Hannon v. Madden, 10 Bush, 667, in which Lindsay, J., thus emphatically declared the effect of the statute quoted above allowing abandoned wives to apply to courts of equity to be empowered to act as *femes sole:*

> "This statute provides for every possible contingency in which it can become necessary for a married woman who has been deserted by her husband to acquire, hold, and dispose of property, to make contracts, and to sue and be sued as a *feme sole.* Instead of the uncertain rule that would most likely result from the application of the English doctrine to the civil status of married women under our laws, it establishes a rule easily understood, of certain application, and the benefits of which may be speedily secured. It makes it the duty of the chancellor, and not of the married woman and the person with whom she may deal, to determine whether she should be relieved of the disabilities imposed, and deprived of the protection afforded by the law to *femes covert.* The legislature intended to substitute this statute for the common law. It is not merely cumulative, it comprehends and includes the whole subject, and leaves no right or privilege necessary to be enjoyed or exercised by the abandoned wife to be deduced from or upheld by common law principles or precedents. Its provisions are to be liberally construed, with a view to promote the object of its enactment, and when this is done there is no necessity for going outside of their reasonable application to obviate all the difficulties incident to the condition of a married woman who has been deserted by her husband and left without the necessary means of support."

B

The next point which I present, is that the act of Congress neither gives married women the authority to subscribe for stock in national banking associations, nor to charge their separate estates in respect of the contingent liability of shareholders to the creditors of the bank.

It is claimed that Sec. 5133, Revised Statutes of the United States, taken in connection with Sec. 5151, quoted *supra*, made Mrs. Cocke liable.

The words of Sec. 5133 relied on are, "Associations for carrying on the business of banking under this title may be formed by any number of natural persons, not less in any case than five."

Section 5151 provides that "shareholders . . . shall be held in individuality liable . . . for all contracts, debts, and engagements of such association, etc."

The words "*natural persons,*" in Sec. 5133, are claimed by the learned counsel to include married women; and, if I do not misapprehend him, his argument is that, *ex vi termini*, the act of Congress invests married women with the power to subscribe to stock in national banks.

To my mind this argument has no force whatever. It was the intention of the Congress that corporations or joint stock companies having an artificial personality should not become shareholders. That right was therefore limited to "*natural*" persons. But statutes of general application affecting purely civil rights have never been construed to apply to persons not *sui juris* with reference to their subject-matter, any more than criminal statutes to persons *doli incapax* because of tender years. Infants, idiots, and married women are not within the purview of enabling statutes unless expressly named. This has been the law from an early period. This was probably first declared in cases construing the English statute of wills, which, notwithstanding the generality of the language used, has always been held not to include infants or married women. The question arose in Cutter v. Butler, 25 N. H. 343. Bell, J., said:

> "Section 1 of chapter 156 of the Revised Statutes might seem broad enough to include the case of married women, 'Every person of the age of twenty-one years and of sane mind may dispose of his property and of any right or interest he may have in any property by his last will in writing.' But it has never been held to apply to the case of married women. (Marston v. Norton, 5 N. H. 205; Osgood v. Breed, 12 Mass. 525; Anonymous, Dyer 354; Powell Dev. 140; Morse v. Thompson, 4 Cush 562.)"

If any doubt could arise as to the meaning of the words "natural persons" in Sec. 5133 of the Revised Statutes, it is removed when we recur to Sec. 5152, which regulates the liability of executors, administrators, guardians, and trustees. Those classes of persons are relieved from personal liability as stockholders, but the estates and funds in their hands are made liable "in like manner and to the same extent as the testator, intestate ward, or person interested in such trust fund would be, *if living and competent to act and hold the stock in his own name*." It is clear, therefore, that the liability of funds in the hands of a trustee or guardian of an infant or married woman would depend on the ulterior question, whether the married woman or infant "would, if living, be competent to act and hold the stock in his own name" Further space devoted to the discussion of this question would be wasted.

But does the subscription of shares by the wife (admitting its validity for the sake of the argument) constitute a valid charge upon or pledge of her separate estate for the security of the contingent and future liability arising from section 5151? It must be remembered that this is a *personal* liability, and that it is just of the same character in the case of a married woman as in the case of a man. It is an individual or personal liability, and attaches at the moment of subscription although it is future and contingent as to its amount and extent. Was it ever supposed that a man or an unmarried woman charged their estate by the act of subscription with this future and contingent liability? If such was understood to be the law, no more national banks would be organized.

But the very essence of a charge by a married woman of her separate estate is that she must intend to do so. It is not necessary that the intention shall be expressed in the writing, but it must actually exist although it may be implied from her condition and the circumstances attending the act. (See Bell v. Kellar and Burch v. Breckinridge, *supra.*) But there is in this case no allegation that, in acquiring the stock, Mrs. Cocke intended to charge her separate estate, that she dealt with reference to it, nor of any facts from which such an intention might be inferred.

The liability of Mrs. Cocke, if it exists, is a personal liability, and the execution of a subscription for stock can not be a charge on her separate estate; for the doctrine of charging is a pure invention of courts of equity, adopted *ex necessitate rei*, to prevent an act evidently intended to be valid from becoming utterly void and nugatory. The English and Kentucky cases, in which married women have been held to have charged their separate estates by the execution of a note or other informal writing, proceed on the idea that it is in the nature of an appointment of her separate estate to the use of the creditor as a security for the payment of a debt, and that her general personal engagements are not valid as charges or otherwise. (2 Story's Eq., § 1401; Hulme v. Tenant, 1 Brown's Chy. 16; Murray v. Barbe, 3 M. & K. 209; Field v. Sowle, 4 Russ. 112; Morse v. Craig, 5 Bos. & Pul. 162; Bell v. Kellar, and Burch v. Breckinridge, *supra*). And I think that no well considered case can be found in which, while a personal liability was held to exist, it was also held that the writing evidencing the liability created a charge on property unless it contained express words importing a charge.

Besides the Kentucky cases already cited, showing that the separate estates of married women are not subjected by courts of equity on the ground of a charge or incumbrance on account of their general personal engagements, I refer to Partridge v. Stocker, 36 Vt. 108; Frary v. Booth, 37 Vt. 78.

Charges on married women's separate estate are not created on mere implication. The facts and circumstances must clearly show such an intention. The mere creation of debt is not sufficient, and no court would be justified in inferring an intention to charge for a future and contingent liability without the clearest evidence of such intention. Property charged is thereby put in lien. In fact a charge is a species of equitable mortgage, and the conservative policy of the law will never sanction a charge for such liability, except on express words or the clearest implication. (Burch v. Breckenridge, *supra.*) The banks are primarily liable to the creditors, and the liability of the stockholders is an ancillary one, in the nature of a suretyship. In cases of suretyship the law never implies a charge, but express words are necessary. (Yale v. Dederu, 18 N. Y. 265; Willard v. Eartham, 15 Gray, 328; Dale v. Robinson, 51 Vt. 20.) In Kentucky a married woman can not, even by a mortgage executed on a privy examination, charge her separate estate with a suretyship. (Horschman v. Brashears, 79 Ky. 424.)

In conclusion of this branch of the argument, I suggest that it is rather inconsistent to contend that Mrs. Cocke was, as a *natural person,* under the act of Congress liable as if discovert, and at the same time contend that, as her subscription would otherwise be void because of coverture, the court must construe it to be a charge on her separate estate, and imply the requisite intent on her part to prevent it becoming an utterly invalid and meaningless act. (Coleman v. Woolley, 10 B. Mon.)

IV.

One more point remains to be briefly considered. Admitting the validity of the subscription and the consequent personal liability of Mrs. Cocke, and that the subscription imported not only a personal liability, but the intention to charge her separate estate with the future and contingent liability created by the act, this bill is still fatally defective.

As has already been shown, the trustees of Mrs. Cocke's estate are not made parties, the terms of the trust are not set forth, it does not even appear that she had any *separate* estate. It is alleged that she has property "in her own right," but whether personal or real, general or separate, does not appear, nor whether she acquired it by descent or distribution, or by will or deed, nor whether it was held by trustees for her separate use. There is neither description nor *situs* given, nor does it appear that the property sought to be subjected is situated within the jurisdiction of the court. As the charge on separate estate is a partial disposition of it (Jarman v. Wilkerson; Bell v. Kellar, *supra*), it is absolutely essential that there should be a description of the property sought to be subjected and the tenure by which it held. (Aylett v. Ashton, *supra.*) The trustees holding the legal estate are indispensable parties. On this bill it would have been impossible, if taken *pro confesso*, for the court to have rendered any judgment whatever. Leave to amend was offered below and declined.

An affirmance is asked.

B. F. BUCKNER,
For Defendant in Error.

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Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 42.

M. L. BUNDY, Receiver of the Hot Springs National Bank,

APPELLANT,

against

WILLIAM M. COCKE,

APPELLEE.

ADDITIONAL BRIEF.

B. F. BUCKNER,

For Appellee.

JUDD & DETWEILER, PRINTERS.

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 42.

M. L. BUNDY, RECEIVER, APPELLANT,

vs.

WILLIAM M. COCKE, APPELLEE.

I beg leave to submit the following additional suggestions:

1.

The cases in the supplemental brief of the learned counsel for appellant and his argument, I think, fail to meet the question at issue, viz: Can a married woman, in the absence of any enabling statute, become a member of a private corporation?

The case of Witters *vs.* Sowles, 35 Fed. Reporter, 641, decides that a married woman is, under the law of Vermont, capable of making the contract which creates the relation of corporator in a bank or other commercial corporation, as will be seen by reference to the same case, reported in 32 Federal Reporter, 768.

The decision is expressly rested on the ground that by the law of Vermont the disability of coverture does not extend to the case of a subscription to the capital stock of a corporation. The law of Vermont is in this particular different from the common law of England and of Kentucky. By the English and Kentucky law a chose in action accruing during coverture becomes the property of the husband on reduction to possession, and if not reduced to possession survives to the wife on her becoming discovert. The capacity of a *feme covert* to enter into the contract of membership in a corporation does not exist at common law. The absolute absorption of the wife's legal existence into that of the husband prevents her entering into any contractual relations, unless expressly authorized so to do by statute.

The case of Hobart *vs.* Johnson (19 Blatchford, 359) is expressly based on the existence of a New Jersey statute providing that "any married woman shall * * * have the right to bind herself by contract in the same manner and to the same extent as though she were unmarried."

The case of Sayles *vs.* Bates, 5 Atlantic Reporter, 499, is also based on the admitted fact that in Rhode Island married women have the capacity to become stockholders in private corporations.

Except Mrs. Matthewman's case, I think none of the authorities referred to on the other side decides that a married woman may be a corporator in a private corporation. That case may well be questioned as a correct exposition of English law, as it is in conflict with the English cases cited in the original brief. I lodge with the clerk a volume containing "European Arbitrations," before Lords Westbury and Romilly, and refer the Court to two cases therein:

Mrs. Scarisbrook was a married woman who subscribed for shares in her own name without her husband's knowledge. On the winding up of the company she was sued by the official liquidators, and on a plea of coverture the action was dropped. The question of the husband's liability was brought before the arbitration tribunal, and Lord Westbury said: "He takes his wife for better, for worse, and although she acts without his approval, as he would take the property so he must take the liability. If we do not have *her* on, because she is a married woman, in any case we must have *him* on as representing the liability of the married woman." (Page 105.)

In D'Ouseley's case, in the same volume, page 136, the wife was entitled to a legacy. Her husband allowed her to receive the money to her separate use, and she invested it in shares in an incorporated company in her own name and received from time to time the dividends declared. Her husband never in any way claimed either shares or dividends, but permitted her to deal with them as separate estate. On the winding up of the company the husband was held liable, although Mrs. Matthewman's case was cited in the argument made in his behalf.

These cases and others that might be cited show that a married woman cannot, without statutory authority, become a member of a corporation, and that the rule of the common law makes the ownership of the property and the consequent liability therefor, that of the husband.

But Mrs. Matthewman's case may be admitted to be good law in England, and yet Mrs. Cocke, by the law of Kentucky, may not be liable. The modern cases in England go to the extent of complete enfranchisement of the wife as to her separate estate, while in Kentucky she is a *feme sole* only *sub mode*. Her right of alienation is expressly limited by statute, and her assumption of contractual power can only be accomplished by the aid of the chancellor.

2.

A few words as to the claim that the supposed subscription operated as a charge on Mrs. Cocke's separate estate. The argument is that if she subscribed she must have intended to take the shares as her separate estate and to bind her other separate property for any liability resulting from ownership of the shares. This argument necessitates the abandonment of the theory that a married woman has power, notwithstanding the disabilities of coverture, to become a member of a corporation, and presupposes the common-law invalidity of her act. It is sought to be made valid in equity because of a supposed intention to contract with reference to her separate estate. In fact, the idea is based on the fallacy that every act by which a married woman becomes indebted *must* be a dealing with her separate estate. The Kentucky cases to which I have referred completely refute this idea (Bell *vs.* Kellar, Burch *vs.* Breckinridge, Coleman *vs.* Woolley, *supra*).

B. F. BUCKNER,
For Appellee.